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CONTENTS

	PAGE
Supreme Court—October 1954 Term	37
Procedure Act Cases During 1955	53
Other 1955 Federal Cases	56
State Cases	83

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SUPREME COURT—OCTOBER 1954 TERM

APA: Applicability.—A key question in any administrative proceeding is that of the applicability of the Administrative Procedure Act to such proceeding. For it is only to the extent that the Procedure Act is applicable that the agency concerned is bound to observe the procedural requirements imposed by the 1946 statute. In its now-famous decision in *Wong Yang Sung* v. *McGrath,* 339 U. S. 33 (1950), the Supreme Court held that the APA was applicable to deportation proceedings and that such proceedings consequently had to comply with the demands of sections 5, 7, 8 and 11 of the Act. No sooner had that case been decided, however, than Congress put a rider in a 1950 appropriation bill expressly exempting immigration proceedings from the APA. This appropriation rider was repealed (with all other existing legislation in the field) by the comprehensive revision of the immigration law which was enacted by the McCarran Act in 1952. But the 1952 Act does not deal expressly with the question of the applicability of the APA to the deportation proceedings provided for in it. That question has, however, been definitely answered by the highest Court in *Marcello* v. *Bonds,* 349 U. S. 302 (1955).

Petitioner in that case conceded that the Immigration Act's express authorization for a "special inquiry officer" to preside at the deportation proceeding brought that officer within the saving clause of section 7(a) of the APA excepting officers specially provided for by or designated pursuant to statute. Hence he could not, as Wong Yang Sung had successfully done five years earlier, claim that he was entitled to be heard before an examiner appointed under section 11 of the APA. But he did urge

that the other safeguards imposed by sections 5, 7 and 8 of the Procedure Act were applicable, especially that providing for separation of functions within the adjudicating agency. The majority of the Court rejected petitioner's argument, holding that the APA was not applicable at all to proceedings conducted under the 1952 Immigration Act. According to Mr. Justice Clark, it is clear, from the 1952 Act's detailed coverage of the same subject matter dealt with in the hearing provisions of the APA, that Congress intended to set up a specialized administrative procedure applicable to deportation hearings. It is true that the APA was used by the draftsmen of the immigration statute. But, declares Justice Clark's opinion, "it was intended only as a model, and when in this very particularized adaptation there was a departure from the Administrative Procedure Act—based on novel features in the deportation process—surely it was the intention of the Congress to have the deviation apply and not the general model. Were the courts to ignore these provisions and look only to the Administrative Procedure Act, the painstaking efforts detailed above would be completely meaningless. Congress could have accomplished as much simply by stating that there should be a hearing to determine the question of deportability." Id. at 309. The Court's holding was made despite its express recognition of the salutary principle that exemptions from the terms of the APA are not lightly to be presumed; modifications of that Act by subsequent statutes must be express. In the Court's view, the direction in the Immigration Act that the proceedings prescribed therein should be the sole and exclusive procedure for deportation proceedings constituted such express modification. As Justice Clark puts it, "Unless we are to require the Congress to employ magical passwords in order to effectuate an exemption from the Administrative Procedure Act, we must hold that the present statute expressly supersedes the hearing provisions of that Act." Id. at 310.

Bias.—*United States ex rel. Accardi* v. *Shaughnessy,* 347 U. S. 260 (1954), discussed in last year's Bulletin, 7 Ad. L. Bull. 2, came up again to the Supreme Court for decision, this time on the merits of petitioner's procedural claim. In its 1954 decision the Court had held that petitioner was entitled to try to prove his allegation that the denial of his application for suspension of deportation by the Board of Immigration Appeals was prejudged through the issuance by the Attorney General, prior to the Board's decision, of a confidential list of "unsavory characters" including petitioner's name, whose deportation he wished, which made it impossible for petitioner to secure fair consideration of his case. The Court remanded the case to the district court for a hearing on petitioner's allegation. On the remand, the district court found, after a full hearing, that the Board of Immigration Appeals members reached their individual and collective decision on the merits, free from any dictation or suggestion by the Attorney General, and denied petitioner relief. The court of appeals reversed. Although

the Board members unequivocally testified —the Chairman in person and the others by deposition—in support of the trial judge's finding, the court of appeals held that it was unreasonable to hold that the Attorney General's action had no influence on the Board's decision. As Judge Frank expressed it, "it is incredible, human nature being what it normally is, that the Attorney General's statements * * * did not *unconsciously* influence the Board members so that they felt obliged not to exercise their discretion and, without doing so, to decide against Accardi. Any other finding involves reliance on so remarkable a degree of improbability as to be untenable." *United States ex rel. Accardi* v. *Shaughnessy,* 219 F. 2d 77, 80-81 (2d Cir., 1955). In Judge Frank's view, the Board members, in deciding against Accardi's application for suspension of deportation, were controlled by what amounted to an order from their superior so to decide.

The Supreme Court disagreed with Judge Frank's reasoning, choosing instead to follow the approach of Harlan, J., who had dissented in the court of appeals. Like Judge Harlan, the highest Court felt that Accardi was entitled, before the district court, only to a hearing on whether the Board's denial of discretionary relief represented its own untrammelled decision or one dictated by the Attorney General. And the testimony given by the Board members showed that they consciously believed, when they testified, that the Attorney General's statements amounted to no more than a calendar order (i.e., a direction to give preference, merely in point of time, to consideration and decision of such cases), and that, beyond that, those statements did not have any effect on the Board's decisions. Mr. Justice Clark expressly rejected Judge Frank's assertion that it was "incredible" that the Board members were not influenced—at least unconsciously—by the Attorney General's actions, stating that there was nothing incredible in the uncontradicted testimony produced before the trial judge. "In the face of such evidence, we do not believe that speculation on the effect of subconscious psychological pressures provides sufficient justification for rejecting the District Court's finding as clearly erroneous." *Shaughnessy* v. *United States ex rel. Accardi,* 349 U. S. 280, 283 (1955). See, similarly, *Marcello* v. *Bonds,* 349 U. S. 302, 311-14 (1955).

An outside commentator must agree that the facts of the *Accardi* case may justify the assertion of the dissenting Justices that the Attorney General had actually prejudged Accardi's petition. It does not, however, follow from this that they are correct, as a matter of law, in their assertion that the Attorney General's prejudgment deprived Accardi of the benefit of the Attorney General's discretion fairly exercised after a hearing as the law prescribes. As pointed out in last year's Bulletin, 7 Ad. L. Bull. 3, it is the settled rule that mere prejudgment on the part of an agency does not constitute such legal bias as to disqualify it from deciding a case, any more than similar prejudgment alone will disqualify a judge in a court of law. Under Accardi's allegations, it is true, there

was more than the usual type of prejudgment case. For he had, in effect, charged the Attorney General with dictating the decision of the Board of Immigration Appeals. It may well be, as the majority of the Court found, that the testimony of the Board members negatived Accardi's allegations, for it showed that they had actually exercised their own untrammeled discretion despite what the Attorney General said or did. One wonders, however, whether the Court has adequately answered Judge Frank's analysis of the *unconscious* effect on the Board of the Attorney General's action. Certainly, it is difficult for one concerned with fair agency procedure not to agree, with Justice Black, that the Attorney General's actions, which proclaimed a strong desire and purpose to deport, among others, Accardi, placed the Board, the members of which hold office completely at the Attorney General's will, in a position that no judicial agency should be. The "Attorney General's publicized program made it impossible to expect his subordinates to give Accardi's application * * * fair consideration. * * * The use of administrative bodies as agencies of justice under law is seriously weakened by proceedings such as these." 349 U. S. at 292-93.

PROBING MENTAL PROCESSES.—In the *Accardi* case just discussed, the Court's decision was based upon the testimony of the administrative officers concerned that they had exercised their own discretion, uninfluenced by the dictates of the Attorney General, in deciding Accardi's petition. It is, however, not at all certain, in the present state of our administrative law, that the district court was justified in receiving such personal testimony from agency members about their mental processes. In his dissenting opinion, Justice Black expresses doubt that such a practice is authorized. "I deem it bad practice to subject administrative officers, acting in a quasi-judicial capacity, to a probe of the mental processes which led them to decide as they did. That is what the Court sanctions here. We have already decided that this practice is no more desirable than that of probing the minds of judges to try to fathom the reasons which prompt their decisions." 349 U. S. at 290.

To support his assertion, Justice Black cites the celebrated fourth *Morgan* case. 313 U. S. 409 (1941). In that case, the Court declared that an administrative official should not be subjected to an examination of his deciding processes such as that involved in *Accardi*. It is, of course, recognized that the decision in *Morgan IV* makes it most difficult for a private party to prove that the mental processes of those who decided his case were not up to the required standard. In the normal case, if the deciding officials cannot be questioned, how is he to prove that the standard has not been followed? At the same time, one should bear in mind that the interest of the private litigant is not all that is at stake in these cases. Just as the probing on the witness stand of the judge's mental processes would be destructive of judicial responsibility, so must the integrity of the administrative process be equally respected. In addition, one should bear in

mind the practical limitations upon judicial power in this field. A reviewing court cannot probe the mental processes of an administrative tribunal any more than it can those of a trial court. Its function is to determine whether the evidence in the record supports the agency findings, not to determine whether the agency in fact considered the evidence. "According to an early English judge, 'The devil himself knoweth not the mind of man,' and a modern reviewing court is not much better equipped to lay bare unexposed mental processes." *NLRB* v. *Donnelly Garment Co.*, 330 U. S. 219, 229 (1947).

Concentration of functions.—In *Marcello* v. *Bonds*, 349 U. S. 302 (1955), already discussed *supra* p. 37, petitioner claimed that the deportation order issued against him was invalid because there had been an unlawful concentration of the functions of prosecutor and judge in his case. Such concentration was said to result from the supervision of the special inquiry officer who had conducted the hearing by the investigative and prosecuting officials of the Immigration Service. This situation clearly violated section 5(c) of the Administrative Procedure Act; but we have seen that the Court held in the *Marcello* case that the APA was inapplicable to deportation proceedings. Petitioner, however, went further and asserted that requiring him to have his case adjudicated by such a subordinate of the prosecutors deprived him of due process. Though this claim might seem to have merit as a matter of academic theory (how can one be said to be accorded due process when the agency organization violates what the noted Report of the British Committee on Ministers' Powers declared to be the first and most fundamental principle of natural justice, *i.e.*, that no one shall be a judge in his own cause?), the concentration of functions has become too firmly established in the administrative process to be subject, at this late date, to constitutional attack. This is true whether one looks at the administrative process generally or at the specific field—that of deportation—at issue in *Marcello*. In either case, the legislative authority to concentrate functions in a single agency appears by now settled beyond question. See *In re Larsen*, 85 A. 2d 430, 436 (N. J. Super. 1952). In the *Marcello* case, the Court was consequently able to dismiss the due process claim with the following sentence: "The contention is without substance when considered against the long-standing practice in deportation proceedings, judicially approved in numerous decisions in the federal courts, and against the special considerations applicable to deportation which the Congress may take into account in exercising its particularly broad discretion in immigration matters." 349 U. S. at 311.

Even if one concedes the correctness of the Court's decision on the constitutional question, that is far from answering the question of the desirability of the concentration of functions. And it is that precise question that tends to give one pause, regardless of how clearly he may be convinced of the constitutional power of the legislature to authorize concentration. This may be true even in cases governed

by the APA, whose provisions have been said to deal only partially with the concentration problem. *In re Larsen,* 86 A. 2d at 436. How much more true then is it of an agency like that concerned in *Marcello,* which is exempt even from the limited safeguards of the APA! Ever since the *Wong Yang Sung* case, 339 U. S. 33 (1950), the Immigration Service has been recognized as a perfect exemplification of the type of concentration that has been wellnigh universally condemned. In the *Marcello* case, as the dissenting Justices emphasize, the officer who conducted the hearings, decided the case, and made recommendations for deportation was connected with the Immigration Service. This hearing officer was subject to the supervision, direction and control of the supervisory officers of the Service who perform investigative and prosecutorial functions. Thus the hearing officer adjudicated the very case which his superiors initiated and prosecuted. That the dangers inherent in such administrative organization are not purely theoretical is shown by a case adverted to by Justice Black in his already referred to *Accardi* dissent, in which the immigration authorities had relieved an immigration hearing officer from his duties because they believed that the hearing officer had failed adequately to present available derogatory information against an alien. *Shaughnessy* v. *United States ex rel. Accardi,* 349 U. S. at 292. Though the Court may be right as a matter of constitutional law in upholding the concentration of functions against due process attack, the administrative lawyer can hardly help but feel uneasy with a system where such cases can occur. "It is hard to defend the fairness of a practice that subjects judges to the power and control of prosecutors. Human nature has not put an impassable barrier between subjection and subserviency, particularly when job security is at stake. * * * The idea of letting a prosecutor judge the very case he prosecutes or supervise and control the job of the judge before whom his case is presented is wholly inconsistent with our concepts of justice." *Marcello* v. *Bonds,* 349 U. S. at 319, 318.

Hearing officer reports.—Last year's Bulletin, 7 Ad. L. Bull. 18, discussed in some detail *Mazza* v. *Cavicchia,* 105 A. 2d 545 (N. J. 1954), which appears destined to become a leading case on the law of administrative procedure. In it, the Supreme Court of New Jersey held that the use by an agency of a secret hearing officer's report to aid it in its decision process violated the private party's right to a fair hearing. The practice of secret hearing officer reports is one which is not unknown in other States as well. It is to be hoped that the *Mazza* decision marks the beginning of the end of a practice so contrary to the essentials of fair procedure and that the courts in other States will follow a New York decision, *O'Meally* v. *Rohan,* 142 N. Y. S. 2d 239 (App. Div. 1955), relying expressly upon the *Mazza* reasoning to outlaw such practice.

Those who strongly feel that the *Mazza* case was correctly decided have received strong support from the decision of the United States Supreme Court in *Gonzales* v. *United States,* 348 U. S. 407 (1955). As

is well known, the problem of the secret examiner report is one which can no longer arise in most federal agencies, for under section 8(b) of the Administrative Procedure Act the initial or recommended decisions of examiners are expressly made a part of the record and must be submitted to the parties. The same is not, however, true in federal agencies not governed by the APA and a question analogous to that presented in the *Mazza* case has arisen in one of the most important of them, namely, the agency charged with administration of the Universal Military Training and Service Act. Under that law, one who claims exemption as a conscientious objector may appeal from his local draft board's denial of his claim. Such appeals are referred by the appeal board to the Department of Justice for its recommendation. The Department is required to hold a "hearing" before action. In the *Gonzales* case, a hearing was held before an officer designated by the Department, who recommended denial of the conscientious objector classification. The Department, in its report to the appeal board, made a similar recommendation. No copy of this report or other notice of the recommendation was given petitioner prior to the appeal board's decision. Petitioner contended that the failure to furnish him the report rendered his classification invalid. The Supreme Court agreed with this contention, declaring "we believe it * * * to be implicit in the Act and Regulations—viewed against our underlying concepts of procedural regularity and basic fair play—that a copy of the recommendation of the Department be furnished the registrant at the time it is forwarded to the Appeal Board, and that he be afforded an opportunity to reply." 348 U. S. at 412.

It is interesting to note that the Court, in reaching its decision, followed an approach not unlike that used by Chief Justice Vanderbilt in *Mazza* v. *Cavicchia*. In the first place, as the New Jersey jurist emphasized last year, Mr. Justice Clark starts by stating that cases holding that an examiner report is not necessary to begin with are inapplicable to the instant question. Nor is it relevant to the question at issue, Justice Clark declares, that the report and recommendation of the Department of Justice are only advisory. On the contrary, a natural corollary of the Department's advisory position is that a registrant be given an opportunity to rebut this recommendation when it comes to the appeal board, the agency with the ultimate responsibility for classification. In these cases, it should be noted, the Department of Justice is in a position analogous to that of an examiner or other hearing officer in the ordinary administrative-law case. It is the appeal board that is in the decision-making position of the agency head in a case like *Mazza*. If the individual is to be able adequately to present his case to the decision-making authority, he must be informed of all the material upon which such authority acts, including the report and recommendation of the Justice Department. As Justice Clark states, "if the registrant is to present his case effectively to the Appeal Board, he must be cognizant of all the facts before the Board as well as

the overall position of the Department of Justice." Id. at 413. Interestingly enough, though some commentators have criticized the *Mazza* decision because, they assert it was improperly based upon the exclusiveness-of-the-record doctrine (see, e.g., 68 Harv. L. Rev. at 364), the cases cited by Justice Clark to support this statement are the leading Supreme Court decisions holding that agency action must be based exclusively upon the record. This certainly implies anything but a disagreement by the nation's highest tribunal with the reasoning of the New Jersey court.

In dissenting from the decision last year in *Mazza* v. *Cavicchia,* Jacobs, J., relied, among other things, upon the asserted failure of the private individual to show specific prejudice to him from the use of the secret hearing officer report. It should, however, be noted that, in a companion case to its *Gonzales* decision, the Federal Supreme Court has rejected the view that prejudice must be shown in a case of this kind. In the case referred to, the Court invalidated a draft registrant's conviction because he had not been provided with a fair resumé of the adverse evidence against him. The Government argued that no prejudice was specifically shown, but the Court held that this argument could be readily disposed of. In accordance with the statutory plan and the concepts of basic fairness which underlie all our legislation, the Court held in 1953 that, under the statutory requirement of a "hearing", the Justice Department must furnish the registrant with a fair resumé of the adverse evidence. *United States* v. *Nugent,* 346 U. S. 1 (1953). And, says Justice Clark, "It is clear in the circumstances of this case that it has failed to do so, and that petitioner has thereby been deprived of an opportunity to answer the charges against him. This is not an incidental infringement of technical rights. Petitioner has been deprived of the fair hearing required by the Act, a fundamental safeguard, and he need not specify the precise manner in which he would have used this right—and how such use would have aided his cause—in order to complain of the deprivation." *Simmons* v. *United States,* 348 U. S. 397, 405-06 (1955).

Review of examiner.—One of the most controversial of the recommendations made by the Hoover Commission Task Force, in its recent report, is that assimilating review by an agency of initial decisions of its examiners to review by a court of the agency's own decisions. Under the Task Force's proposal, on review of initial decisions, "the scope of review by the agency * * * shall be the same as that of the court upon review of the decision of the agency." Adoption of this suggestion would clearly complete the process of judicialization of agency hearing officers which was begun ten years ago by the Administrative Procedure Act. It would make the examiner within the administrative process the counterpart of the trial judge in the judicial process. Like the latter, the examiner would make the initial decision, which would be final unless reversed on appeal; but the agency reviewing power, like that of an appellate court, would be a limited one. The decision of

the examiner, like that of a trial judge, would stand as the final decision unless it was "clearly erroneous."

Interestingly enough, at least two federal courts of appeals have expressed the view that the scope of agency review urged by the Task Force is already the law under the Supreme Court's holding on the weight to be given to examiner findings in the now-celebrated *Universal Camera* case, 340 U. S. 474 (1951). In a case in the Seventh Circuit, the court held that the Board of Immigration Appeals had exercised too broad a review power in rejecting the findings of the special inquiry officer in a deportation case. According to Judge Major, the Board was endowed only with the typical reviewing function; it was given no authority to try an issue *de novo*. "It appears that the Board is bound by the findings of the Special Inquiry Officer, if substantially supported, in the same manner and to the same extent as is a court of review." *United States ex rel. Brzovich* v. *Holton,* 222 F. 2d 840, 843 (7th Cir. 1955). This is more or less analogous to the view urged by the Hoover Commission Task Force.

Even more important, because it led to a resolution of the matter by the Supreme Court, was the similar decision by the Court of Appeals in the *Allentown Broadcasting Corp.* case. Like the Seventh Circuit Court, Judge Bazelon, too, seemed to feel that agency review of an examiner is, already under existing law, analogous to review by a court. In reversing the FCC, which had made an independent examination of the evidence before its examiner, the court emphasized the weight which had to be given to the examiner's findings, even though the finding at issue was not based on the examiner's judgment as to the credibility of different witnesses. As Judge Prettyman, who dissented, aptly puts it, "the court seems to equate an agency's power to reverse its own examiner's finding with a reviewing court's power to reverse the agency's finding." *Allentown Broadcasting Corp.* v. *FCC,* 222 F. 2d 781, 793 (D. C. Cir. 1954).

Regardless of how one may feel on the merits of the Hoover Commission Task Force proposal on the scope of agency review of examiners, the view of the two cases just discussed that such is, in fact, already the existing scope of agency review goes too far. The *Allentown* case, which involved the FCC, was, of course, governed by the APA, and it expressly provides in section 8(a) that, on review of examiner initial decisions, the agency "shall have all the powers which it would have in making the initial decision." This is clearly inconsistent with limitation of the agency's reviewing power. In a case like that of deportation, to which the APA is inapplicable, this result is even clearer. If the hearing officer's findings are to be given weight, as a matter of law, it is only because the provisions of the APA require it. The *Universal Camera* decision itself, upon which the Seventh Circuit court relies, was based expressly upon the Procedure Act and the intention of its draftsmen to improve the status and responsibility of examiners.

It is therefore hardly surprising that the Supreme Court, in the *Allentown Broadcasting Corp.* case, rejected the court of appeals view on the scope of agency review. As Justice Reed states, the court of appeals based its holding on its understanding that an examiner's findings are not to be overruled by an agency without a "very substantial preponderance in the testimony as recorded." "We think this attitude goes too far. It seems to adopt for examiners of administrative agencies the 'clearly erroneous' rule applicable to courts." *FCC* v. *Allentown Broadcasting Corp.*, 349 U. S. 358, 364 (1955). In the absence of specific legislation such as that recommended by the Hoover Commission Task Force, it is difficult to disagree with the Supreme Court decision. Certainly the whole rationale of administrative procedure rests upon findings by the agency designated by Congress to make the adjudication. To hold that the power of the agency to reverse its examiner is only as extensive as the power of the court to reverse the agency is inconsistent with the responsibility of decision placed on the agencies themselves by their enabling statutes. "The responsibility for decision thus placed on the agency is wholly inconsistent with the notion that it has power to reverse an examiner's findings only when they are 'clearly erroneous.' Such a limitation would make so drastic a departure from prior administrative practice that explicitness would be required." Id. at 364.

EXHAUSTION OF ADMINISTRATIVE REMEDIES. —*Whitehouse* v. *Illinois Central Railroad Co.*, 349 U. S. 366 (1955), is the most recent illustration of the strictness with which the highest Court adheres to the rule requiring the exhaustion of administrative remedies before recourse can be had to the courts. It arose out of a proceeding before the National Railroad Adjustment Board. A dispute had arisen between the Order of Railroad Telegraphers (Telegraphers) and the Illinois Central Railroad Co. (Railroad) regarding the latter's employment of a member of the Brotherhood of Railway and Steamship Clerks (Clerks) in a position which Telegraphers claimed should, under its collective bargaining agreement with Railroad, be assigned to a member of Telegraphers. After attempted settlement by negotiation had failed, Telegraphers submitted the dispute, in accordance with the Railway Labor Act, to the National Railroad Adjustment Board. Notice of the proceeding was served by the Board on Telegraphers and Railroad. Railroad filed a submission with the Board asserting that the disputed position involved clerical work of the type customarily performed by clerical forces in the industry and was in fact occupied by a member of Clerks, one Shears. Accordingly, Railroad contended, the Telegraphers' claim should be denied, but in any event notice and opportunity to be heard should be afforded Clerks and Shears. The ten members of the Board, five representing labor and five representing the carriers, deadlocked on the merits and a Referee was appointed as a member of the Board, in conformity with the statute. When Telegraphers' claim came on for hearing, a carrier member of the Board

objected that no notice had been served on Clerks as the statute required. This objection was considered by the Board, but it did not carry, and the hearing resumed. After the hearing had ended but prior to decision, Railroad filed the present action against the Board. Railroad alleged that the failure to give notice violated the Act and that an award to Telegraphers would not prevent Clerks from prosecuting a similar claim successfully. The complaint sought injunctions directing the Board to issue notice to Clerks and Shears, and restraining it from proceeding with any disposition of the claim until such notice had been given.

Although both the district court and the court of appeals granted the relief requested, the Supreme Court reversed on the ground that the injuries alleged were not fairly to be deemed irreparable and without other adequate administrative or judicial remedy. Where the Board had not yet made any award and might render a decision which could occasion no possible injury to Railroad, the potential injuries which allegedly might result to Railroad from an adverse decision by the Board were too speculative to warrant the use of extraordinary remedies. According to Mr. Justice Frankfurter, "Here relief is sought prior to any decision on the merits by the Board. * * * If failure to give notice be treated as an error, in an award in favor of the Railroad it would constitute at best harmless error which could not be made the basis of challenge by Railroad, Telegraphers or Clerks. The Railroad's resort to the courts has preceded any award, and one may be rendered which could occasion no possible injury to it. The inevitable result is to disrupt the proceedings of the Board." 349 U. S. at 373.

One wonders whether the Court's decision is solicitous enough of the interest of someone like the Railroad who, in this case, is in the position of an employer caught in a jurisdictional dispute between two unions. Its concern is that of getting a binding decision in the one proceeding, which will resolve the question of which union is entitled to the particular job. Hence its concern with having Clerks made a party to the proceeding. If Clerks is not made a party, Railroad will have to defend in another proceeding brought by Clerks, should the first decision favor Telegraphers. It is this dualization of what, from Railroad's point of view, is basically only one proceeding, that Railroad is seeking to avoid by the bringing of its action in the district court. It is true, as Justice Frankfurter points out, that among the injuries asserted by Railroad, only the possibility that it is being put to needless expense incident to the pending Board proceeding will necessarily be involved if judicial relief is denied. The learned Justice's declaration that such expense is inadequate basis for judicial intervention may be justified under Supreme Court decisions. But does it adequately take account of realities, as far as Railroad is concerned?

Preclusion of Review and the APA.—In *Heikkila* v. *Barber,* 345 U. S. 229 (1953), the Supreme Court had held that a deportation order issued under the Immigration

Act of 1917 could not be reviewed directly under section 10 of the Administrative Procedure Act, declaring that such order could be attacked only by habeas corpus as had been the case prior to the APA. The alien had contended that the right of review of deportation orders had been broadened by the Procedure Act, but the Court held that the provision in the 1917 Act that deportation orders of the Attorney General shall be "final" prevented the APA from giving an additional remedy, since section 10, by its own terms, excepted statutes that precluded review. The Court in *Heikkila* was, it should be noted, most careful to point out that its decision applied only to the 1917 Immigration Act. It did not consider whether the same result would be reached under the Immigration and Nationality Act of 1952, which went into effect after Heikkila's complaint had been filed. However, since it is the 1952 Act alone that governs deportation proceedings today, it is the question of its effect upon the *Heikkila* holding that is now of practical consequence.

Rubinstein v. *Brownell,* 206 F. 2d 449, decided in 1953 by the Court of Appeals for the District of Columbia, held that the 1952 immigration law, far from adopting the *Heikkila* view that deportation orders might be judicially challenged only by habeas corpus, was expressly intended to make review under section 10 of the APA available in such cases. When the decision of the Court of Appeals was affirmed in 1954 by an equally divided Supreme Court, 346 U. S. 929, it was widely felt that the *Heikkila* holding no longer governed and this view was confirmed by a decision of the Court of Appeals for the Second Circuit expressly following *Rubinstein. Pedreiro* v. *Shaughnessy,* 213 F. 2d 768 (2d Cir., 1954). But the Court of Appeals for the First Circuit, in another case decided during 1954, refused to adhere to the *Rubinstein* decision, asserting that, since it had been affirmed by an equally divided Court, it was not an authoritative precedent. *Batista* v. *Nicolls,* 213 F. 20 (1st Cir., 1954).

The conflict between the two circuits on the question of whether *Heikkila* or *Rubinstein* governs review of deportation orders under the 1952 Immigration Act has been conclusively answered in favor of *Rubinstein* by *Shaughnessy* v. *Pedreiro,* 349 U. S. 48 (1955), a six-to-three decision of the nation's highest tribunal. In that case petitioner sought review of a deportation order in a petition for a declaratory judgment and injunctive relief. In holding that such relief was available under section 10 of the APA, the Court rejected the contention that the fact that the 1952 Act provided, as did the 1917 Act, that deportation orders of the Attorney General shall be "final" expressed a Congressional purpose to give the word "final" in the 1952 Act the same meaning *Heikkila* had given "final" in the earlier statute and thus continue to deprive those subject to deportation orders of all right of judicial review except by habeas corpus. According to Mr. Justice Black, who delivered the majority opinion, "Such a restrictive construction of the finality provision of the present Immigration Act would run coun-

ter to § 10 and § 12 of the Administrative Procedure Act. Their purpose was to remove obstacles to judicial review of agency action under subsequently enacted statutes like the 1952 Immigration Act." Id. at 51.

To one not concerned, as the Court had to be, with reconciling its decision with its earlier holding in *Heikkila,* it would seem that the dissenting opinion of Mr. Justice Minton is correct in its assertion that the issue in *Pedreiro* is, in actuality, much like the one the Court faced in *Heikkila.* Despite Justice Black's attempt to distinguish the two cases, it is the similarity rather than the purported difference that strikes the outside observer. The relevant provision of the 1952 Immigration Act is a reenactment, almost verbatim, of the "final" clause of the 1917 Act. Yet this does not necessarily mean that this case should be decided as was *Heikkila.* Few, if any, administrative-law decisions in recent years have been as unsatisfactory as that which the highest Court rendered in the *Heikkila* case. For the Court to reconsider such a holding is not unnatural, especially when there is available an easy alternative to direct overruling of its earlier decision.

In an earlier comment on the *Heikkila* decision, 6 Ad. L. Bull. 21, the present writer asserted that it was significant primarily because of its indication of an apparent recession of the Court from its prior indication of a hospitable attitude toward interpretation of the APA. If that is true, the *Pedreiro* case indicates that the Court has returned to the more amicable approach exemplified by its *Wong Yang Sung* decision, 339 U. S. 33 (1950). As Justice Black aptly states, "the Procedure Act is to be given a 'hospitable' interpretation * * * It is more in harmony with the generous review provisions of the Administrative Procedure Act to construe the ambiguous word 'final' in the 1952 Immigration Act as referring to finality in administrative procedure rather than as cutting off the right of judicial review in whole or in part. And it would certainly not be in keeping with either of these Acts to require a person ordered deported to go to jail in order to obtain review by a court." 349 U. S. at 51.

Parties Defendant.—*Shaughnessy* v. *Pedreiro,* just discussed, is also of importance in resolving the question of necessary parties defendant in review actions, which has recently caused difficulty in our administrative law. Last year's Bulletin, 7 Ad. L. Bull. 76, sharply criticized decisions of lower federal courts holding that the Commissioner of Immigration and Naturalization was an indispensable party in an action for review of a deportation order. In its *Pedreiro* decision, the Supreme Court has indicated its belief that such criticism has not been unjustified. For the Court, in unusually strong language, rejected the contention that the Commissioner of Immigration and Naturalization had to be joined as a defendant to an action for declaratory relief such as that brought in *Pedreiro.* Justice Black stated that, to accept the contention, would be to require the alien to go to the District of Columbia to obtain jurisdiction over the Commis-

sioner. "To impose this burden on an alien about to be deported would be completely inconsistent with the basic policy of the Administrative Procedure Act to facilitate court review of such administrative action. We know of no necessity for such a harsh rule. Undoubtedly the Government's defense can be adequately presented by the District Director who is under the supervision of the Commissioner." 349 U. S. at 53. Nor could the argument that a judgment against a District Director alone might not be binding in other immigration districts change the result. In the normal case, a decision on the merits would not be lightly disregarded, either by courts or agencies. And even if, in some cases, difficulties may arise, that is not adequate reason for subjecting an alien to the great burden of having to go with his witnesses to the District of Columbia, which may be far distant from his home, in order to contest his deportation. The basic policy premise which should guide the courts in cases like this was aptly articulated by Judge Medina when the *Pedreiro* case was before the court of appeals. "To require the joinder of the Commissioner of Immigration and Naturalization or the Attorney General under these circumstances would, we think, sacrifice substance to mere form and serve no other purpose than perhaps to deny all relief short of habeas corpus to an indigent alien deportee, whose constitutional rights are just as sacred in the eyes of the law as those of a citizen." *Pedreiro* v. *Shaughnessy,* 213 F. 2d at 770.

Power of Reviewing Court.—One of the fundamental principles which our courts have developed in the law of review is that no objection to agency action can be raised on review which was not urged before the agency itself. *FPC* v. *Colorado Interstate Gas Co.,* 348 U. S. 492 (1955), indicates the strictness with which that principle is applied. In the case referred to, the court of appeals reversed a rate order of the FPC on the ground that it erred in excluding from the cost of service base the loss resulting from gasoline operations and remanded the case for further consideration. The court rejected the Commission's contention that the court was without jurisdiction to consider that question *sua sponte* since it was not first presented to the Commission by the private party in its petition to the Commission for rehearing. The court was of the view that it had inherent power to note *sua sponte* basic erroneous legal conclusions adduced from established facts, asserting that in reviewing the Commission's order it had inherent power to consider and correct manifest and substantial error appearing in the record which leads to an unjust end result. See 7 Ad. L. Bull. 83-84.

The Supreme Court, in a unanimous decision, reversed, holding that the lower court had no authority to consider an objection which had not been raised before the Commission. The Natural Gas Act prescribes explicitly that no objection shall be considered by the court of appeals unless such objection shall have been urged before the FPC. Nor did it make any difference, in the Court's view, that the objection had not been raised by the pri-

vate party, but had been raised, considered and sustained *sua sponte* by the reviewing court itself. It cannot be assumed, said Mr. Justice Burton, that Congress intended to permit the court to consider the objection *sua sponte,* merely because the objection was not presented to the court by the aggrieved party. "Section 19(b) reflects the policy that a party must exhaust its administrative remedies before seeking judicial review. To allow a Court of Appeals to intervene here on its own motion would seriously undermine the purpose of the explicit requirements of § 19(b) that objections must first come before the Commission." 348 U. S. at 471.

The court of appeals had relied on section 10(e) of the APA in support of its holding, asserting that it gave the reviewing court itself power to set aside agency action found to be "not in accordance with law" or "contrary to constitutional right, power, privilege, or immunity" and this power was not limited only to objections raised by the parties. The highest Court declared, however, that the APA section did not affect the result. The Procedure Act purports to strengthen, not weaken, the principle requiring the exhaustion of administrative remedies. Section 10(e) of the APA, states Justice Burton, applies only to situations where the question at issue has been properly "presented," which was not done here. It is not a reasonable interpretation of the general terms of the APA to hold that they repeal the administrative procedures specifically set forth in the Natural Gas Act. Id. at 500.

Ultra Vires.—*Peters* v. *Hobby,* 349 U. S. 331 (1955), which at one time gave promise of being a constitutional *cause célèbre* finally resolving the validity of the Federal Government's loyalty program, has been decided by the Supreme Court, without consideration of the constitutional issue, by the application of the basic theory of *ultra vires* upon which administrative jurisdiction in our law is grounded. American public law presupposes a hierarchy of lawmakers within the State. At the apex is the constituent assembly or its equivalent, which alone has the authority to promulgate the organic instrument under which the State is governed. The provisions of the Constitution enacted by it constitute the supreme law of the land. The law made by any other organ of the State is valid only so far as it does not conflict with the terms of the Constitution. Next in the lawmaking hierarchy come the elected representatives of the people, given authority to enact statutes the provisions of which are legally binding upon all, provided only that they are not inconsistent with the Constitution. At the base of the lawmaking hierarchy is the administration. The subordinate position of administration in the hierarchy of lawmakers means, however, that administrative exercises of authority are valid only if they do not conflict with the Constitution and with the statutes enacted by the Legislature. Or, to put it another way, administrative action is valid only so far as it is *intra vires.* It is *ultra vires* and illegal if inconsistent with the prescriptions of an organ superior to

administration in the hierarchy of lawmakers within the State.

In the normal case, it is its enabling statute that is the source of an agency's authority and it is it which determines the *vires* of the agency's action. In the case of the Federal Government's loyalty program, there is no enabling legislation, for the program has not been based upon Congressional authorization. It is Executive Order 9835—the so-called loyalty order of President Truman under which the Government's program was set up (see *Schwartz, American Constitutional Law,* 258 *et seq.* (1955)—that takes the place of an enabling statute. Agency action administering the loyalty program must consequently be *intra vires* Executive Order 9835; if not authorized by the terms of the Order such action is *ultra vires* and void.

As already stated, it was this basic theory that enabled the highest Court to decide the *Peters* case, without any need for it to deal with the more controversial constitutional question. Petitioner in *Peters* had been barred from government employment after the Loyalty Review Board had determined that there was a reasonable doubt as to his loyalty. He sought a declaration that his debarment was invalid. Petitioner had been twice cleared by his Agency Loyalty Board and his case was never referred to the Loyalty Review Board by petitioner or the agency concerned. Instead, the Review Board determined, on its own motion, to conduct a "post-audit" of the Agency Board's determination and, to this end, to hold a hearing and reach its own decision in the case. According to the majority of the Court, this action of the Board was *ultra vires* Executive Order 9835 and hence plainly beyond its jurisdiction. Under the President's Order, the Loyalty Review Board was authorized to review only "cases involving persons recommended for dismissal on grounds relating to loyalty by the loyalty board of any department or agency." And, even as to these cases, the Board was denied any power to undertake review on its own motion; only the employee recommended for dismissal, or his department or agency, could refer such a case to the Review Board. That being the case, said Mr. Chief Justice Warren, the Board had no authority to act as it did in the instant case. It is true that the Board's own regulations purported to give it the authority to post-audit loyalty cases on its own motion. But it is basic in our system that an agency cannot, by exercise of its rule-making power, give itself authority beyond that granted by its enabling legislation (and, in this case, as has been emphasized, Executive Order 9835 takes the place of the enabling statute). The Board could not do by regulation precisely what it was not permitted to do under the President's Order. Although the Order limited the Board to appeals from adverse rulings, the regulation asserted authority over appeals from favorable rulings as well; and although the Order limited the Board's jurisdiction to appeals referred to the Board by the employee or his agency, the regulation asserted authority to adjudicate individual cases on the Board's

own motion. The regulation was thus invalid. Indeed, declares the Chief Justice, to permit the Board to act under its regulation, in the face of the limitations in the Executive Order, "would be to sanction administrative lawlessness. Agencies, whether created by statute or Executive Order, must of course be free to give reasonable scope to the terms conferring their authority. But they are not free to ignore plain limitations on that authority." 349 U. S. at 345.

PROCEDURE ACT CASES DURING 1955

Compared to recent years, 1955 saw far fewer cases interpreting the Administrative Procedure Act decided by the lower federal courts. This appears to indicate that the main points of doubt in that law have now been resolved judicially. The Administrative Procedure Act in this respect is merely repeating the history of most important statutes. When they are first enacted, such laws give rise to a plethora of cases in which the courts give specific meaning to the inevitable ambiguities that inhere in all legislation. As time goes on, however, the questions of meaning are resolved judicially and the number of cases sharply declines.

Applicability.—According to *Chiu But Hao* v. *Barber,* 222 F. 2d 821 (9th Cir. 1955), a hearing under the Administrative Procedure Act is not required under the statute authorizing the Attorney General to withhold deportation in any case where the alien would be subject to physical persecution if deported. The alien claimed he was entitled to an Administrative Procedure Act hearing upon his application for a stay of deportation. The court held that though section 5 of the Administrative Procedure Act provides for the mode of hearing in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, the relevant section of the Immigration Act is not such a statute. The court states that it is not dealing here with an order similar to an order for deportation in respect to which the alien would be entitled both to a hearing and to a judicial review of his hearing. The order for deportation is a thing of the past. Now the alien seeks a stay which comes within the second excepted category mentioned in section 10 of the Administrative Procedure Act, i.e., agency action which "is by law committed to agency discretion."

Though the result reached in this case may be right, it does not follow that the court's approach to the question of the applicability of the Administrative Procedure Act is correct. The exceptions in section 10 of the Procedure Act have no relevancy except in determining whether the judicial review section of that staute is applicable. They cannot be used to determine whether the hearing required by section 5 must be held. That determination depends, according to *Wong Yang Sung* v. *McGrath,* 339 U. S. 33 (1950), upon whether in the particular case a full hearing is required by statute or by the Constitution. In the case under discussion, no hearing is required by

the relevant statute, 8 U. S. C. § 1253(h). Nor, it seems, is this a case where due process requires a hearing, since an alien does not have a "right" not to be deported where he might be subjected to physical persecution. That being the case, the hearing requirements of sections 5, 7, 8 and 11 of the Administrative Procedure Act are inapplicable.

Another case where the hearing provisions of the Administrative Procedure Act were held inapplicable is *First National Bank* v. *Federal Sav. & Loan Ass'n,* 225 F. 2d 33 (D. C. Cir. 1955). The court there held that the Federal Home Loan Bank Board may grant permission to a federal savings and loan association to establish a branch bank without an agency hearing under the Procedure Act. The court assumed that a hearing may well be required in connection with the granting of an original charter. But, said it, the same formalities are not required in the consideration of an application for a branch. Neither the Home Owners' Loan Act of 1933, as amended, nor the regulations thereunder, contains any provision that an application for a branch must be "determined on the record after opportunity for an agency hearing." Hence, section 5 of the Administrative Procedure Act seems inapplicable. Appellants, however, urged that Section 5(e) of the Home Owners' Loan Act gave them protection from "undue injury" in the establishment of a branch, and contended that, even though that act did not specifically provide for a determination on the record, they were entitled, as a matter of constitutional due process, to the adjudication and procedural provisions of the Administrative Procedure Act, citing in support *Wong Yang Sung* v. *McGrath, supra.* The court rejected this view and held *Wong Yang Sung* inapplicable. "We think it clear that, even if it be assumed that Section 5(e) requires an agency hearing on the original grant, there is no such requirement on an application for the establishment of a branch." *Id.* at 36. Since neither due process nor the statute required a hearing, the Administrative Procedure Act procedural provisions were not controlling.

RULE-MAKING.—In *Allegheny Airlines* v. *Village of Cedarhurst,* 132 F. Supp. 871 (E. D. N. Y. 1955), it was claimed that a Civil Aeronautics Board regulation promulgating a traffic pattern for an airport was invalid because it was not promulgated in accordance with the procedure prescribed in section 4 of the Administrative Procedure Act. The court held, however, that the case fell within the exception in section 4 as one "in which the agency for good cause finds [and incorporates such finding in the rule together with a brief statement of the reasons therefor] that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." Examination of the regulation discloses that such requirement was met by incorporating therein the provisions that the amendment "is adopted without delay in order to promote safety of the flying public" and that "compliance with the notice, procedures, and effective date provisions of Section 4 of the Administrative Procedures Act, also known

as 5 U. S. C. A. § 1003, would be impracticable and contrary to the public interest, and therefore is not required."

Effect on judicial review.—According to *Atchison, T. & S. F. R.* v. *United States,* 130 F. Supp. 76, 78 (E. D. Mo. 1955), it is clear that the Administrative Procedure Act merely was a declaration of existing law where judicial review is provided. It is, however, difficult to see how this view can be asserted at this late date, when there have been so many decisions holding that the law of review has been broadened by the Procedure Act.

Preclusion of review.—*First National Bank* v. *First Federal Sav. & L. Ass'n,* 225 F. 2d 33 (D. C. Cir. 1955), involved an action seeking review of a decision of the Federal Home Loan Bank Board granting permission to two federal savings and loan associations to establish branch banks. The court held that review was precluded by the second exception at the beginning of section 10 of the Administrative Procedure Act. "We merely call attention to the fact that, since authority to permit establishment of a branch is clearly committed to agency discretion, the matter is disposed of automatically by Section 10 of the Administrative Procedure Act." *Id.* at 36.

Compare *Leighton* v. *SEC,* 221 F. 2d 91 (D. C. Cir. 1955), where petitioner sought to persuade the Commission to assume jurisdiction to investigate and regulate the issuance and sale by the American Express Company of travelers checks, contending they were securities within the meaning of the Securities Act of 1933. The Commission refused. Petitioner then petitioned the court to review the Commission's refusal, contending jurisdiction resided in the court under the Securities Act and section 10 of the Administrative Procedure Act. The court stated that even were it to assume that the action of the Commission in declining to entertain petitioner's complaint, or to investigate the matters pressed by him, constituted an order of the Commission nevertheless it would be one within the discretion of the Commission and, in any event, not such an order as would be reviewable. The discretionary character of the Commission's action removed it from section 10 of the Procedure Act, which excepts from its provisions for judicial review agency action committed by law to agency discretion.

See *Choy* v. *Farragut Gardens,* 131 F. Supp. 609 (S. D. N. Y. 1955), where an action against the Federal Housing Administration was similarly held barred by the second exception at the beginning of section 10 of the Administrative Procedure Act.

Standing.—*Kansas City Power & Light Co.* v. *McKay,* 225 F. 2d 924 (D. C. Cir. 1955), involved an action by private electric power companies to enjoin federal officers and agencies from carrying out a competing federally supported power program. Plaintiffs sought to base their right to bring the action on their alleged status as persons "suffering legal wrong" or "adversely affected or aggrieved" within the meaning of section 10(a) of the Administrative Procedure Act. But, said the court, the Act does not help appellants. According to Judge Washington, the terms used

in section 10(a) are terms of art. He concurs in the conclusion of the Attorney General that that section was a restatement of existing law. As such, it preserved the limitations on standing developed by the Supreme Court before the Administrative Procedure Act. The court asserts that section 10(a) is for the benefit of "any person suffering legal wrong," that is, one whose legal rights have been violated. These plaintiffs cannot effectively make such a claim. Nor are we confronted with any relevant statute within the meaning of which the plaintiffs are "adversely affected or aggrieved." Plaintiffs relied on the view expressed in *American President Lines* v. *Federal Maritime Board*, 112 F. Supp. 346, 349 (D. C. 1953), which would in effect delete from section 10(a) the phrase "within the meaning of any relevant statute." That view, said the court, cannot be accepted. Nor does section 10(b) of the Administrative Procedure Act help plaintiffs. The reference in that section to "any court of competent jurisdiction" does not of itself establish the jurisdiction of the federal courts over an action not otherwise cognizable by them. Section 10(b) does not render competent a court which lacks jurisdiction on any other ground.

Suits against United States.—According to the Court of Appeals for the First Circuit, the Administrative Procedure Act has nothing to do with a case involving the question of whether the United States has consented to be sued in an action to recover the gratuitous indemnity provided for survivors of members of the armed forces who die in active service. The Administrative Procedure Act contains no provisions purporting to deal with the subject of governmental immunity. The general language in section 10 of that Act cannot be deemed to be an implied waiver of all governmental immunity from suit. See, similarly, *Arizona* v. *Hobby,* 221 F. 2d 498, 500 (D. C. Cir. 1954). Compare *Doehla Greeting Cards* v. *Summerfield,* 227 F. 2d 44 (D. C. Cir. 1955), where an action against the Postmaster General to enjoin enforcement of parcel post rates was held barred as a suit against the United States.

OTHER 1955 FEDERAL CASES

Right to be heard.—One of the most criticized of our administrative-law distinctions is that between so-called "rights" and "privileges." Under it, the right to be heard exists, as a matter of due process, only when the private individual concerned is adversely affected in his personal or property "rights" by agency action. If it is only a "privilege" that is involved, there is no constitutional inhibition against summary administrative action. An important type of case which has until recently been placed within the "privilege" category and, hence not subject to procedural due-process safeguards, has been the passport application case. There have, however, been indications in recent years that the courts have been coming to the view that a citizen has a "right" to a passport, which implies, of course, that such "right" cannot be denied without an opportunity to be heard.

See, e.g., *Bauer* v. *Acheson,* 106 F. Supp. 445 (D.C. 1952).

Schachtman v. *Dulles,* 225 F. 2d 938 (D. C. Cir. 1955), appears clearly to confirm the view that a passport is a "right" of citizenship. Appellant there sued to enjoin the Secretary of State from denying his application for a passport to visit Europe, because he was the head of an organization whose name was contained in the Attorney General's list of subversive organizations and for a declaratory judgment. His complaint was dismissed on motion, the court holding that it failed to state a claim upon which relief could be granted and that since the denial was in the proper exercise of the Secretary's discretion the court lacked jurisdiction. Appellant did not ask that the Secretary be required by the court to issue the passport. He sought in the court of appeals only a ruling to the effect that the denial had been on a ground that was legally insufficient. "This position," said Judge Fahy, "assumes that the discretion residing in the Secretary . . . is subject in its exercise to some judicial scrutiny. We agree. The courts by reason of the Constitution have a responsibility in the matter although a limited one." *Id.* at 940.

The court asserts that the issuance of a passport is not a purely political matter. If it were it would be a non-justiciable one. In other words, a passport is no longer a document "purporting only to be a request, that the bearer of it may pass safely and freely." For it is now, in addition, a document which is essential to the lawful departure of an American citizen for Europe. "The denial of a passport accordingly causes a deprivation of liberty that a citizen otherwise would have. The right to travel, to go from place to place as the means of transportation permit, is a natural right subject to the rights of others and to reasonable regulation under law. A restraint imposed by the Government of the United States upon this liberty, therefore, must conform with the provision of the Fifth Amendment that 'No person shall be . . . deprived of . . . liberty . . . without due process of law'". *Id.* at 941. It is true, as Judge Fahy points out, that it is not procedural due process that is involved in the case as now presented. There is no complaint that the Secretary has failed to disclose the reason for his denial of the passport. Furthermore, a hearing of a sort was granted appellant. And, in this case, the court holds that the denial of the passport because appellant was chairman of an organization listed as subversive was arbitrary (bearing in mind that the case came up on a motion to dismiss and the allegation that the organization was not, in fact, subversive had to be taken as true for the purposes of the appeal).

While the court points out, as indicated, that its decision is not on any procedural ground, there is little doubt that the decision does all but lay the ghost of "privilege" in passport cases. And if a passport is now a "right", as the court so strongly holds, it is clear that it cannot be denied without a full opportunity to be heard. One wonders, indeed, whether, if that is true, the relevant State Department

regulations go far enough in the direction of the hearing required by due process. If a "right" is involved, what is needed is not an informal opportunity to present one's case, but a full and fair adversary hearing, conducted in accordance with the judicial-type safeguards developed in our administrative law.

Compare *Nathan* v. *Dulles,* 129 F. Supp. 951 (D.C. 1955), the case involving the executor of Albert Einstein, where the court held that a passport could not be denied without an opportunity to be heard. It should, however, be pointed out that Judge Schweinhaut stated expressly there that "I do not suggest the form or the manner in which such a hearing should be held but there should be one." *Id.* at 952.

Another case of interest on the right to be heard is *Greenville Television Co.* v. *FCC,* 221 F. 2d 870 (D.C. Cir. 1955). The court there held that allegations, that a change of a competitor's transmitter site would enable the competitor to get telecasting system affiliations and that the resultant increase in the competitor's popularity would decrease protestants' advertising revenues, were sufficient to show that the protesting television broadcast station owners were parties in interest and entitled to a hearing with regard to the granting of authorization for the change of transmitter site. The Commission had found that the injury caused by the affiliation was not caused by the change of transmitter site, so as to make appellants parties in interest, because the affiliation was not ordered by the Commission but resulted from private negotiation. However, the economic injury that gives standing, under *FCC* v. *Sanders Bros. Radio Station,* 309 U.S. 470 (1940), to oppose Commission action, is seldom if ever a direct result of Commission action. Even the grant of a new station license does not automatically take advertising revenue away from existing licensees, but only creates a situation in which the new licensee may be able to get the revenue by private negotiation, yet existing licensees are "adversely affected" and "parties in interest". See, similarly, *Camden Radio* v. *FCC,* 220 F. 2d 191 (D.C. Cir. 1954, on rehearing 1955).

Another FCC case in which the Commission was found unduly to have denied a hearing is *Storer Broadcasting Co.* v. *United States,* 220 F. 2d 204 (D.C. Cir. 1955). The Commission there had promulgated a rule which provided that, in cases involving applications for television stations, it would "in any event consider that there would be such a concentration of control contrary to the public interest, convenience or necessity for any party or any of its stockholders, officers or directors to have a direct or indirect interest in, or be stockholders, officers, or directors of, more than five television broadcast stations." In the case under discussion, the applicant owned five television stations, and the Commission dismissed the application for a television station in Miami, without a hearing and without consideration on the merits, on the ground that its grant would be in violation of the spirit and purpose of the multiple ownership rule. The court held that the FCC rule could not authorize

it summarily to reject all applications coming within its bar against multiple ownership.

The rule in question is not a mere announcement that the Commission has adopted the policy of considering, in every case in which the owner of five television stations applies for an additional license, whether the grant thereof would result in such concentration of control as to be adverse to the public interest. The rule goes further and says the Commission will "in any event" treat the numerical limit as the boundary of public interest, and will deny a hearing to the owner of five television stations upon his application for an additional station. Thus the Commission freezes into a binding rule a limitation upon its consideration of the public interest in a respect in which the facts and circumstances may differ widely from case to case. It has decided *in vacuo* that there can never be an instance in which public interest, convenience and necessity would be served by granting an additional license to one who is already licensed for five television stations. The power so to decide, said the court, has not been committed to the Commission.

On the contrary, the opinion goes on, it is conceivable that in some circumstances, common ownership of even five television stations, though permitted by the challenged rule, might be undue concentration of control; while in other circumstances, common ownership of a greater number might be compatible with the public interest. But whether so or not must be determined on an *ad hoc* basis, after consideration of all factors relevant in the determination of whether the grant of a license would be within the comprehensive concept which the Act calls "the public convenience, interest, or necessity." And the Commission must, both under its statute and due process, hold a full hearing before making the *ad hoc* determinations in individual cases. This holding, the court emphasizes, will not prevent the Commission from considering in each case, in accordance with its announced policy, the question whether granting an additional license to one who is already a multiple owner would place too much control in one licensee, contrary to the public interest. But the multiple owner applicant must be given a chance in a hearing to show, if he can, that still another station will not give him such control of communications media as to prejudice the interests of the public.

See *Watson Bros. Transportation Co.* v. *United States,* 132 F. Supp. 905 (D. Neb. 1955), holding that an ICC order purporting to effectuate a change in an existing certificate of convenience and necessity issued by the Commission could not be issued without notice and hearing.

Notice.—The basic right of an individual to be informed of the case against him was relied upon in *Chernekoff* v. *United States,* 219 F. 2d 721 (9th Cir. 1955). The court there held that a draft Appeal Board's classification of defendant as 1-A was invalid because of the failure to accord him due process of law, where the notice to him of hearing before an officer of the Justice Department, to which the Board transferred defendant's file containing appar-

ently derogatory information concerning his religious sincerity, did not inform him of his statutory right to a summary of any information in the file which might tend to defeat his request for classification as a conscientious objector. Defendant never knew of the derogatory information being considered and never had a chance to explain the same. Had the proper notice been given, this would have been avoided. According to the court, the fair hearing essential to meet minimum requirements of any accepted notion of due process includes the opportunity to know of adverse evidence and to be heard concerning its truth, relevancy and significance. Otherwise such a hearing is in violation of the "concept of ordered liberty." Here when the defendant introduced evidence at the hearing he was like a blind man striking at an invisible foe.

A case involving notice at a later stage of the administrative process is *Namkung* v. *Boyd,* 226 F. 2d 385 (9th Cir. 1955), which involved the claim of an alien that he had not been served with notice of the decision on his petition for a stay of deportation, contrary to a regulation requiring such notice to be served. The court held that the requirement of notice was one of written, not merely oral, notice. Much of the force of this holding is, however, vitiated by the court's finding that the alien could nonetheless not complain, since he admitted actual notice. This, in effect, converts the requirement into one for oral notice only, since such oral notice always gives actual notice.

Another case involving notice of agency action is *Bannout* v. *Brownell,* 129 F. Supp. 488 (D. C. 1955), where an alien had not been given notice that a decision of the Board of Immigration Appeals in his favor had been referred to the Attorney General for review. The court was of the opinion that a fair construction of the regulation which requires the Board of Immigration Appeals to refer to the Attorney General for review of the Board's decision cases of certain specified types, is that it necessarily implies that notice of this reference must be given to the alien or his counsel in order that an opportunity may be accorded for submission of briefs or memoranda or other material to the Attorney General in connection with his review of the decision of the Board. The court did not mean to say that the alien is entitled to an oral hearing before the Attorney General. That would be impracticable. The court did hold that the alien is entitled to notice of the reference to the Attorney General in order that he may submit written argument or material, presenting and arguing the case from the alien's standpoint.

Bill of Particulars.—In *Fry Roofing Co.* v. *NLRB,* 222 F. 2d 938 (1st Cir. 1955), it was held that petitioner was not prejudiced by the failure of the Board to furnish particulars with regard to the petitioner's alleged questioning and threatening of employees concerning union activities. Petitioner was informed of the month when these alleged violations of the Labor Act occurred and also that its general superintendent and assistant general su-

perintendent were the officials who took part in these violations. Under these circumstances the information contained in the complaint was sufficient to acquaint the petitioner with the charges and the issues which would be considered at the hearing.

Bias.—In *United States ex rel. Belfrage* v. *Kenton,* 224 F. 2d 803 (2d Cir. 1955), a case arising out of a deportation proceeding, the court rejected the alien's argument that a special inquiry officer should be disqualified from acting because he is a subordinate of the Attorney General who has made known publicly his intention to enforce the laws of the United States relating to the deportation of Communists, a duty which obviously is his. In this respect, the case is comparable to the *Accardi* case, discussed *supra,* p. 38.

Another bias case is *Fry Roofing Co.* v. *NLRB,* 222 F. 2d 938 (1st Cir. 1955), where a contention that the examiner was biased and prejudiced was centered upon his acceptance of the testimony of the Board's witnesses rather than that of petitioner's witnesses. The court held, however, that, under *NLRB* v. *Pittsburgh S.S. Co.,* 337 U. S. 656 (1949), the fact that an examiner uniformly believes only the witnesses on one side does not indicate any bias on his part. Unless the credited evidence carries its own "death wound," that is, is incredible and, therefore, cannot in law be credited, and the discredited evidence carries its own irrefutable truth, that is, is of such nature that it cannot in law be discredited, the court cannot determine that to credit the one and discredit the other is an evidence of bias. In the instant case the evidence presented by the Board was not incredible nor was the petitioner's evidence of such a nature that it could not be discredited. A similar case is *NLRB* v. *Wagner Iron Works,* 220 F. 2d 126 (5th Cir. 1955), where the rule of the *Pittsburgh S.S.* case was also followed.

On the other hand, in *United States* v. *Peebles,* 220 F. 2d 114 (7th Cir. 1955), the court held that, on the facts, the members of the local board which had ordered defendant's induction were biased and prejudiced. Nor was such bias cured by the fact that defendant could and did appeal to an impartial Appeal Board. The court declared that a registrant is entitled to a full and fair disposition of his contentions at every level of operation of the Selective Service System and a review by an appeal board may not serve to supply a deficiency in a fair hearing by the local board.

Evidence.—Petitioners in *Dolcin Corp.* v. *FTC,* 219 F. 2d 742 (D. C. Cir. 1954, on rehearing 1955), alleged error on the part of the trial examiner when he declined to receive in evidence certain scientific writings. These articles and treatises were offered by petitioners through experts described as "eminently qualified to be fully cross-examined on the science of the field including the literature to the date of the offer." The court stated that, though scientific writings are clearly hearsay, cogent arguments can be made in favor of their use. It went on to assert that authoritative scientific writings can—and should—be freely used by administrative agencies. Congress has said that "Any oral or documentary evidence may be re-

ceived * * *." Administrative Procedure Act, § 7(c). But an agency's decision should not be reversed by reason of the exclusion of scientific writings unless substantial justice so requires. "We would hesitate in most cases to say that a rule almost universal in the courts would, in an administrative proceeding, deny the parties substantial justice. And here the writings in question were not vital to petitioners' case. Lengthy articles were offered on subjects of marginal significance, which had been covered (or could have been covered) by the testimony of witnesses. The record, already of great length, would have been encumbered with a vast amount of miscellaneous learning—some dating back to 1878. We do not think the trial examiner's rulings denied petitioners substantial justice." *Id.* at 749.

That agencies are not bound by the rules of evidence which apply to court proceedings is illustrated once again by *Navarette-Navarette* v. *Landon,* 223 F. 2d 234 (9th Cir. 1955). At the agency hearing there, hearsay statements by four aliens apprehended in appellant's car were received in evidence over objection. The court held that the mere admission of such hearsay did not render the hearing unfair. Under the less stringent rules, administrative tribunals may receive evidence which a court would regard as legally insufficient without vitiating the proceedings. The mere fact that incompetent evidence is received and considered does not in itself establish a want of due process such as would require a reversal on that ground. It should be noted that the court's decision does not imply that it would uphold an agency order based solely upon incompetent hearsay. On the contrary, it states expressly that, even apart from the statements of the four aliens, there was sufficient evidence to sustain the finding of deportability, and there is no showing that the hearing officer relied on the statements.

An interesting evidence case involving judicial approval of a recommendation by the President's Conference on Administrative Procedure is *Chicago Board of Trade* v. *United States,* 223 F. 2d 348 (D. C. Cir. 1955). Petitioner there contended that the FCC erroneously based essential findings upon incompetent evidence. The claimed incompetency was that certain exhibits were not the best evidence. It appeared that certain cost figures depended upon great quantities of underlying invoices and other similar original cost data. Western Union prepared and offered for identification summary exhibits. A witness for the purpose was presented for examination. All the underlying material was assembled at Western Union's New York Offices, and at the end of the first day's hearing a recess for two months was ordered to enable opposing counsel to examine the material and check the accuracy of the proposed exhibits. These counsel, or their representatives, did spend several weeks at that task. Thereafter the exhibits were offered in evidence. Objection was made that they were not the best evidence. No instance of inaccuracy was advanced. The objection was overruled. The court stated that the ruling was correct. The procedure followed was of the sort

recommended by the Judicial Conference of the United States in adopting the Report (page 29) of its Committee on Procedure in Anti-Trust and Other Protracted Cases on September 26, 1951, and also recommended by the President's Conference on Administrative Procedure in its Report (Recommendation 12(b) and (c)) of March 3, 1955. The procedure applies to the problem of vast quantities of documentary material. It fully serves the purposes of the best evidence rule, affords ample opportunity for cross-examination upon points actually disputed, but at the same time eliminates much unnecessary delay, expense, and volume of these records. The accurate determination of fact issues of this sort does not require the actual formal inclusion in a record of bulk material such as this was.

Cross-examination.—In *Dolcin Corp.* v. *FTC*, 219 F. 2d 742 (D. C. Cir. 1954, on rehearing 1955), petitioners complained of errors by the trial examiner in the conduct of the hearing. One grievance was that they attempted to cross-examine some of the Commission's expert medical witnesses concerning statements made by other experts writing in various medical publications. The trial examiner would not allow the questions. Implicit in his rulings was the theory that medical publications were hearsay which could be used upon cross-examination only if the witness had relied upon them in direct examination. Petitioners contended this was an erroneous restriction on the scope of cross-examination and that it warranted reversal. They relied primarily on *Reilly* v. *Pinkus*, 338 U. S. 269 (1949). The court conceded that the case cited stands for the general proposition that an expert witness who bases an opinion to a significant degree upon his reading may be cross-examined as to that opinion by reference to other reputable works in his field. Though the examiner has broad discretion to determine the extent of the cross-examination on written authorities, it is error to exclude such questions by blanket rule, without more. The examiner thus erred in the instant case. The court held, however, that this did not necessarily mean that reversal was warranted. In deciding *Reilly* v. *Pinkus* the Supreme Court could hardly have intended to bring about reversal of every administrative hearing in which the trial examiner improperly excluded some questions on cross-examination—or in which some other error was made as to the admission or exclusion of evidence. In *Reilly* v. *Pinkus*, the works on which the cross-examiner relied apparently were directly relevant to the central issue of the case and were in direct conflict with the Post Office Department's position. As a result they were of great importance to the petitioner. Had the witness been confronted with them and had the conflict been demonstrated to the trier of fact there might well have been a different result. This is especially so as fraud—the good or bad faith of the petitioner—was at issue in the case. But, says the court, that was not the case here. Fraud was not at issue. A cease and desist order of the Federal Trade Commission does not approach the severity of a mail fraud order. And in the instances complained

of here the works which petitioners sought to use touched only indirectly on the central issue.

Another case where denial of the right of cross-examination was claimed is *Navarette-Navarette* v. *Landon,* 223 F. 2d 234 (9th Cir. 1955). In that case, which arose out of a deportation proceeding, statements by four aliens who were apprehended in appellant's car were received in evidence at the hearing over appellant's objection that there was afforded no right to cross-examine or to be confronted by the aliens. The court held that this did not make the hearing unfair. In the present case, the record reveals that the four aliens were granted voluntary departure to Mexico in 1949, were no longer in the United States, and their whereabouts were unknown. Under these facts, failure to produce, for cross-examination, witnesses who cannot be found or whose presence cannot be procured or is not requested, does not make a deportation hearing unfair. One wonders, however, whether this alone justifies the violation of the right of cross-examination. Particularly in deportation cases, where the penalty upon the individual approaches in severity that imposed in a criminal case, great care should be taken that all of the safeguards developed in our administrative law should be observed.

Ex parte evidence.—The basic principle of exclusiveness of the record was applied to prohibit the Attorney General from basing a deportation order upon confidential information not contained in the record in *Orahovats* v. *Brownell,* 134 F. Supp. 84 (D. C. 1955). According to Judge McGuire, the right asserted by the alien in such a case is a legal right, that is, a private right not to be deported except upon the grounds prescribed by Congress, and in situations of this character Congress has specifically provided under the Immigration Act, that there be a fair hearing and this cannot be had where evidence dehors the record is introduced. This means that the power of the Attorney General should not be exercised or invoked in camera but in the open with reasons forthrightly and candidly stated. This is in consonance with our political traditions and our fundamental concept of what constitutes fair dealing, particularly where basic and fundamental rights of individuals are not only involved but in jeopardy and this no matter who they are. The court went on to interpose a *caveat,* indicating that its holding did not mean that the *source* of confidential information had to be disclosed, but only that the information itself had to be made part of the record. One wonders, however, whether this limitation itself is not contrary to the exclusiveness of the record doctrine in cases where due process requires a full hearing. See, similarly, *Maetzu* v. *Brownell,* 132 F. Supp. 751 (D. C. 1955).

But compare *Namkung* v. *Boyd,* 226 F. 2d 385 (9th Cir. 1955), holding that the rule of exclusiveness of the record does not apply to a hearing on an application for a stay of deportation on the ground that deportation would subject the alien to physical persecution. According to the court, such a hearing is not the "classical administrative hearing" wherein the hear-

ing officer must be upheld in his decision if there is substantial evidence to support it, but it is one in which the Attorney General may be advised by the alien as to the basis of his fears. The alien was given such a hearing, but the evidence taken at the hearing is not the full extent of evidence which the Attorney General may consider.

Official notice.—It is well settled that an expert agency can take official notice of matters coming within its *expertise,* even if this means going contrary to some of the evidence presented. Thus, in a workmen's compensation proceeding, the agency may disregard medical testimony and rely upon its own observation of the claimant and its experience in similar cases. According to the Court of Appeals for the Fourth Circuit in *Ennis* v. *O'Hearne,* 223 F. 2d 755 (4th Cir. 1955), however, this does not permit the agency to rely upon its own *expertise* in disregard of *all* the evidence, where the agency does not state clearly that it is so relying. The case referred to was a compensation proceeding under the Longshoremen and Harbor Workers' Compensation Act. The court held that the deputy commissioner's finding was not supported by any evidence at all. Counsel for the deputy commissioner relied on the rule, already referred to, under which an agency can rely solely on its own observation in disregard of medical testimony. According to the court, that rule cannot be applied here. In this case there is no evidence in the record other than the medical reports and the oral testimony of the claimant, all tending to support his claim. In these circumstances, the deputy commissioner must have disregarded *all* the evidence if he based his decision on his observation of the claimant. The court expressed no opinion on the value of such a decision or whether it would uphold such a decision if the deputy commissioner had stated in his order that he was disregarding all the evidence and relying solely on his observation of the claimant, describing what observation formed the basis of his decision. It could not affirm such an order, however, where the deputy commissioner had not stated that his personal observation formed the basis of his decision when the decision was contrary to the record evidence. According to Judge Dobie, judicial review of a deputy commissioner's findings would be meaningless if in every case where the evidence does not support his rulings, the court is bound to accept the contention of counsel that the deputy commissioner disregarded the adverse evidence and relied on his personal observation as the sole basis for his decision, no evidence of such a basis for his decision appearing in his order. If no record evidence exists to support the deputy commissioner's finding, then his finding must affirmatively show that he disregarded the evidence contrary to his decision, and based his decision on his personal observations, noting what those observations were. *Id.* at 758-9.

Exceptions.—In *NLRB* v. *Hansen,* 220 F. 2d 733 (1st Cir. 1955), the court held that where the employer had not filed any exceptions to the findings and recommended order of the trial examiner, such exceptions could not be urged as a defense

in a proceeding to enforce an NLRB order adopting the examiner's recommended order as that of the Board, where no excuse was offered for the failure to file exceptions to the examiner's report. Although the court relies upon section 10(e) of the Labor Act, which bars judicial consideration of any objections not raised before the Board, its holding is actually one which applies in all agency cases, whether or not there is an express statutory provision.

FINDINGS.—In *NLRB* v. *Capital Transit Co.*, 221 F. 2d 864 (D. C. Cir. 1955), the court held that where an order of the Board requiring a transit company to bargain with a union certified by the Board as exclusive bargaining representative was unsupported by any finding showing the factual basis for the inclusion of certain employees, claimed by the employer to have been supervisors, within the bargaining unit so designated, a petition for enforcement of such order would be denied and the case remanded to the Board for further proceedings. The court stated that, since the Board failed to make findings in connection with the reasons it gave, it could not decide now whether they sufficed to support the order. The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based. Findings are essential not only to facilitate judicial review by revealing the factual basis for agency action but also to reflect the determination of policy or judgment which the agency alone is authorized to make. For another findings case of interest, see *Spiegel* v. *Public Utilities Commission*, 226 F. 2d 29 (D. C. Cir. 1955).

REASONED DECISIONS.—In *Cole* v. *Young*, 226 F. 2d 337 (D. C. Cir. 1955), an action by a former government employee against the chairman of the Civil Service Commission to determine the legality of his removal from employment, it was contended by petitioner that the agency concerned, in not giving the reasons for his dismissal, had not complied with a statutory requirement of a "written statement of the decision of the agency head." The court held, however, that the statute did not require a reasoned opinion and that the bare statement of the decision of dismissal was enough. "We are all familiar with the difference between 'opinions' and 'decisions' in judicial matters. 'Opinions' state the reasons, and 'decisions' merely state the actions taken. The statute here used a well-known word, and we give it its well-known meaning." *Id.* at 341. There was a strong dissent by Judge Edgerton, who declared "Frequently, in legal connections, 'decision' means not only a result but the reasons for the result. The Administrative Procedure Act follows this usage. It requires that 'All decisions (including initial, recommended, or tentative decisions) shall become part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof.' Section 8(b) * * *. The letter telling appellant he was

dismissed, but not telling him why, was evidently not 'a written statement of the decision' as Congress uses that term in connection with administrative procedure. The required statement is plainly intended to be a safeguard against arbitrary action. Unless reasons are given no safeguard is provided." *Id.* at 343. Judge Edgerton's approach appears more consistent with the basic principles of fairness upon which our law of administrative procedure is based. The only question is whether those basic principles themselves are applicable in a case like *Cole* v. *Young,* involving the dismissal of a government employee on security grounds.

Compare *Ypparila* v. *United States,* 219 F. 2d 465 (10th Cir. 1954), holding that the National Selective Service Appeal Board should, at the least, informally state the reasons for its classification of a registrant.

Rehearing.—An interesting case involving a rehearing to have additional evidence taken by an agency is *Dolcin* v. *FTC,* 219 F. 2d 742 (D. C. 1954, on rehearing 1955). The court there held that petitioner's motion for leave to adduce additional evidence before the Commission should be granted. The evidence in question was a test conducted by a research organization on the therapeutic qualities of petitioner's product, as well as questionnaires filled out by doctors who had used the product. The court held that, as the evidence was clearly material and there was no indication that it was available at the time of the hearing, petitioner should be granted an opportunity to present it. The interesting aspect of the case results from the court's refusal to stay the finality of the FTC's order pending the hearing. It bases this refusal upon the fact that the case had been "in contest for a long time. The Commission issued a complaint against petitioner on August 18, 1949. The hearings, with many delays, lasted until November of 1951. It is now nearing five years since the case arose. As we have said, we think the order of the Commission—as here modified—is amply supported by the present record. The public interest in the rapid suppression of misleading medical advertisements is obvious. We see no need to delay finalization of the modified order throughout the taking of the additional evidence. Section 5(c) provides that the court may order additional evidence to be taken 'upon such terms and conditions as to the court may seem proper.' We think a proper condition here is that the order of the Commission—as here modified—become final as though this were a simple affirmance. * * * If after further hearing the Commission desires to amend its order appropriate steps may be taken looking toward an alteration of our decree, or other proper action on our part." *Id.* at 751. Chief Justice Stephens delivered a strong dissent, declaring that the "court should not set a precedent in the field of administrative law and procedure permitting, apart from any use of the temporary injunction or restraining order process available to the Commission upon application and proper showing to a district court, the enforcement of an order on an incomplete record —a precedent which in effect permits treat-

ing an order both ways at the same time, i.e., treating it as valid for the purpose of enforcement but as not valid for lack of full hearing of all of the available competent, relevant, material, non-cumulative evidence." *Id.* at 760.

Exhaustion of Administrative Remedies.—Interestingly enough there are more reported cases in 1955 involving exhaustion of administrative remedies than any other topic. This is most unfortunate for a doctrine whose purpose is to expedite proceedings. It is not intended to summarize all of these exhaustion cases here, but only to refer to those which, it is felt, are of interest to the members of the Section.

The exhaustion case which undoubtedly received the most attention from the legal profession (though primarily because of the parties involved) is *National Lawyers Guild* v. *Brownell,* 225 F. 2d 552 (D.C. Cir. 1955). It involved an action by a national bar association to enjoin the United States Attorney General from designating the association as Communistic and to obtain a judgment declaring the executive orders under which the Attorney General was acting and the procedures adopted by him under such orders unconstitutional and declaring the Attorney General disqualified to rule in such case because of alleged prejudgment of the issues. The claim of prejudgment was based upon strong public statements made by the Attorney General which indicated his belief that plaintiff was Communist controlled. The court said that this claim did not bar the necessity for resort in the first instance to the administrative process. "We cannot assume in advance of a hearing that a responsible executive official of the Government will fail to carry out his manifest duty. Our conclusion on the point is that the plaintiffs must await the event rather than attempt to anticipate it." *Id.* at 555. The Supreme Court has treated developments at the administrative hearing as determinative of the issue of claimed prejudgment. Implicit in that treatment is the thought that decision upon alleged prejudgment must await the presentment of proof of effect.

Nor, according to the court, could plaintiff avoid the exhaustion of administrative remedies rule by its contention that there was no constitutional authority for the listing by the Attorney General. The court held that a claim of constitutional invalidity does not negate the requirement for the exhaustion of administrative remedies. In its view, *Joint Anti Fascist Refugee Committee* v. *McGrath,* 341 U. S. 123 (1951), is not inconsistent with this holding. "If the administrative procedure there involved had provided a forum for the spreading of the facts upon an open record and a determination of the issues upon that record, it seems to us these Justices would necessarily have held that a court could not step in until that procedure had been pursued. If a revelation of the facts and a decision thereon had been provided, they would not have held that organizations proposed for listing could stop the action by avoiding the established procedure." *Id.* at 556.

The court also held that a claim that the rules of procedure adopted by the Attorney General were fatally defective did not change the result. And the same was true of a claim that the Administrative Procedure Act was violated. Nor was it material to the doctrine of exhaustion that the administrative remedy in this case was established by regulation rather than by statute.

Three interesting decisions deal with the effect of an important 1948 case, *Wettre* v. *Hague,* 168 F. 2d 825 (1st Cir. 1948), where the court declared that resort to the courts might be had in spite of failure to exhaust available administrative remedies when it is made to appear that public officials are acting in violation of their clearly defined statutory duties. In *Young* v. *Higley,* 220 F. 2d 487 (D. C. Cir. 1955), the Court of Appeals for the District of Columbia appeared to disagree with the *Wettre* decision, the court stating "we disagree with the view that administrative remedies need not be exhausted if the administrative action complained of is clearly erroneous." (*Id.* at 488) and citing *Wettre* v. *Hague* as standing for the rejected view. A more recent similar decision is *May* v. *Glore,* 132 F. Supp. 327 (E. D. N. Y. 1955). Both of these cases indicate the strictness with which the exhaustion of remedies rule is applied in the Federal courts. Even though the agency concerned may be acting in excess of its statutory, or even constitutional, jurisdiction, still the private party must resort to any administrative remedies that may be available. See *Myers* v. *Bethlehem Shipbuilding Corp.,* 303 U. S. 41 (1938), the leading federal case.

It is hardly surprising, therefore, that the Court of Appeals for the First Circuit itself has recently limited its decision in the *Wettre* case. According to Judge Woodbury, in the recent case referred to, "We certainly did not intend in that case [the *Wettre* case] to consider, let alone to decide, any jurisdictional question other than the one before us * * * nor by holding in the *Wettre* case that the plaintiffs were within a recognized exception to the general rule requiring exhaustion of administrative remedies because they had succeeded in showing an obvious violation of their clear rights under § 4 of the Act of 1912, * * * did we intend to indicate that as a general proposition plaintiffs in cases such as this did not need to exhaust their administrative remedies even in the absence of such a showing. On the contrary, we saw no good reason then and we see none now why the general doctrine of exhaustion of available administrative remedies * * * should not apply in cases such as this with as broad scope and as much force as in other cases, and we so hold." *Fitzpatrick* v. *Snyder,* 220 F. 2d 522, 525-6 (1st Cir. 1955).

One of the few exceptions to the exhaustion rule recognized in the federal courts is that which permits the administrative process to be short circuited if the agency remedy is clearly inadequate. In *Atlantic Carriers* v. *United States,* 131 F. Supp. 1 (S. D. N. Y. 1955), a suit in admiralty was brought for breach of a charter party. Libelant recognized that, under the charter,

an administrative remedy was available which would normally have to be exhausted. It alleged, however, that the libel was filed for protective purposes only—to avoid the bar of the two year statute of limitations of the Suits in Admiralty Act. Although the disputes clause would normally be a bar to the institution of a suit until the completion of the administrative process, libelant urged that the libel should remain on the docket because its administrative remedy might prove so dilatory that it might be time barred from later bringing suit to review the administrative determinations of fact and to press contentions of law. The basis in the instant action for threatened inadequacy of the administrative remedy, appearing in the affidavit of libelant's Secretary-Treasurer, was that, predicated upon the average time the agency has taken to currently process claims in relation to the number of claims having precedence over libelant's claim, its claim "will not be processed until some time in January of 1956." After this date, other steps must allegedly be taken to complete the administrative process.

The court clearly recognized that the administrative remedy might be inadequate where the private party might be barred from the courts by the statute of limitations before the agency process would be completed. According to Judge Kaufman, the inadequacy by time delay of an administrative remedy permits resort to the courts. Where the threat of having the statute of limitations permanently foreclose judicial review is imminent the injured party should be permitted to at least file, if not prosecute, his libel in the court. And the court refers to *Wessel, Duval & Co.* v. *United States,* 126 F. Supp. 79 (S. D. N. Y. 1954), where Judge Noonan permitted the filing of a protective libel "a few days before [the statute of limitations] would have precluded the libelant from ever bringing the action." In the instant case, however, the court held that, on the facts, the threat of the bar of the two year statute of limitations was not an imminent one, so that the exhaustion of administrative remedies rule could not be avoided.

Compare *Le Baron* v. *Olesen,* 125 F. Supp. 53 (S. D. Cal. 1954), where it was held that the failure to attend an administrative hearing did not constitute violation of the exhaustion rule. The doctrine of exhaustion of administrative remedies relates to remedies available to the plaintiff by way of appeal from administrative orders. "Even if we were to assume that the doctrine referred to hearings instituted against the plaintiff, the 'remedy', if it could be so designated, had been exhausted. The hearing was concluded and an order issued. There is no administrative appeal from this order, therefore the plaintiff's administrative remedies have been exhausted." *Id.* at 55.

Odell v. *United States,* 135 F. Supp. 539 (Ct. Cl. 1955), holding that the statute of limitations is not tolled during the time consumed in the exhaustion of administrative remedies.

PRIMARY JURISDICTION.—*Herman* v. *Northwest Airlines,* 222 F. 2d 326 (2d Cir. 1955), indicates once again the strictness

with which the federal courts now adhere to the doctrine of primary administrative jurisdiction. It arose out of an action for injuries to a passenger in an airplane owned and operated by one of two corporate defendants. The court held that the Civil Aeronautics Board has jurisdiction over claims of invalidity of an airplane carrier's regulations affecting the value of a carrier's services, such as a regulation limiting the time for the commencement of actions for injuries to passengers, regardless of whether the carrier owes a duty to file a regulation with the Board. Such limiting regulation is required by statute to be filed with the Board and must be deemed valid until the Board declares otherwise. The court relied on its decision in *Lichten* v. *Eastern Airlines,* 189 F. 2d 939. Indeed, said the court, its present holding escapes at least two of Judge Frank's criticisms of the majority's ruling in that case; for the regulation there involved exculpated the carrier from liability for its negligence on the agreed route and also upon a deviation. It is indeed true that a common carrier of passengers is not free to set as short a period as it pleases within which a passenger must sue for damages arising from its negligence—the period must be "reasonable"—but that is a quite different question from whether it may altogether exculpate itself from the consequences of its negligence; or, indeed, whether it may limit the recovery to less than the actual loss or injury. Both regulations do indeed "affect" the "value of the service"; but it is a far greater limitation of the carrier's responsibilities to allow it to limit its care than to fix a period before the end of which suit must be brought. Assuming for argument that no regulation ought to be allowed to relieve the carrier of its duty, there is every reason for allowing the Board to pass upon the adequacy of the time for suit.

Administrative finality. — In *United States Overseas Airlines* v. *CAB,* 222 F. 2d 303 (D. C. Cir. 1955), petitioner sought review of a CAB order dealing with applications for certificates of convenience and necessity covering unlimited cargo operations by air between the United States and European points. Pursuant to statute the Board's recommended decision and order was transmitted to the White House for Presidential approval. As of the time of hearing the cause in court the matter was pending at the White House. The court held that all review was precluded under *Chicago and Southern Air Lines* v. *Waterman S.S. Corp.,* 333 U. S. 103 (1948). The instant petitioner sought to avoid the doctrine of that case by asserting claims of procedural irregularity in the Board's action. The court held, however, citing two unpublished decisions by itself, that it had been settled that, despite claims of procedural irregularity, under the *Waterman* opinion and decision the court has no jurisdiction to review orders of the *CAB* in matters which by statute are for the determination of the President. Petitioner urged that it did not attack the validity of the order which was under consideration by the President but merely attacked the order which denied them participation in the proceedings. But quite

clearly, said the court, the practical effect of petitioner's position was that the order which went to the President was invalid due to procedural irregularity. Therefore, the court declared, the case came within the established rule.

Perhaps the most blatant provision for administrative finality in our law is that which applies to the Veterans Administration. Under it, "All decisions rendered by the Administrator of Veterans' Affairs * * * or the regulations issued pursuant thereto, shall be final and conclusive on all questions of law and fact, and no other official or court of the United States shall have jurisdiction to review by mandamus or otherwise any such decision." This provision is literally applied by our courts to preclude review since only a "privilege" (veterans' benefits) is involved which can be granted by Congress on its own terms, including one making the administrative remedy the only remedy. *Brasier* v. *United States,* 223 F. 2d 762 (8th Cir. 1955), is a recent decision illustrating this. It arose out of an action by the owner of a barber college against the United States, and others for damages from the alleged repudiation of his contract with the Veterans Administration for the training of eligible veterans. The court, relying expressly on the statutory provision for administrative finality, held that the decision to terminate the plaintiff's contractual privilege to train veterans was an administrative decision of the Administrator of Veterans' Affairs. As such it was final and conclusive and not subject to review. The district court was without jurisdiction to overrule, override or disregard the decision.

Compare *United States* v. *St. Paul Mercury Indemnity Co.,* 133 F. Supp. 726 (D. Neb. 1955), where the court held the *Brasier* holding inapplicable to an action by the United States to recover for domiciliary care and treatment for poliomyelitis accorded a veteran.

Statute of Limitations.—In *Northwest Marine Terminals Ass'n* v. *FMB,* 218 F. 2d 815 (9th Cir. 1955), petitioner filed a petition to review a final order of the Federal Maritime Board which was entered more than 60 days before review was sought. It contended that inasmuch as it filed a motion with the Board for reconsideration, its 60 days ran from the entry of the order denying reconsideration. The court rejected this contention, stating that the 60 days commences when the Board's final order is handed down and a subsequent petition for rehearing or reconsideration does not extend that time.

Standing.—In American administrative law, the question of the "standing" of plaintiff to seek review is a crucial one, for, in the absence of such standing, there is no real "case" or "controversy" and hence no justiciable issue to which federal judicial power can validly be directed. The cases are not, however, altogether consistent on whether the required standing exists, particularly where such standing is said to result from plaintiff's position as a competitor of the one who is the subject of the agency order which plaintiff seeks to have reviewed.

That economic interest is sufficient to confer standing has been clear since *FCC* v. *Sanders Bros. Radio Station,* 309 U. S. 470 (1940). Thus, the economic interest of a stockholder is enough to give him standing to challenge an ICC order which grants the application of an investment company in which he holds stock to be considered as a carrier subject to the provisions of the Interstate Commerce Act rather than those of the Investment Company act to which it had heretofore been subject. Nor is it relevant that the stockholder cannot show specific money damage. The court was convinced that a stockholder, who seeks only that which Congress has provided for him as matter of right, need not show money damages to entitle him to sue. It is enough if he shows that no one else will act on his behalf. Here the corporation, which is controlled by those he is attacking and which has sought the ruling to which he objects, will not help him. Where the question is that of unlawful usurpation of regulatory control as distinguished from the reasonableness of regulatory action by an agency with conceded jurisdiction, a stockholder has standing to attack an administrative order in which the corporate management has acquiesced even though he cannot show an interest other than a derivative one on behalf of the corporation. In such a case it is immaterial that the stockholder cannot show that he is actually damaged by the fact that the Interstate Commerce Act, rather than the Investment Company Act, is made to apply. He is entitled to the protection of the latter act in accord with the Congressional intent. His financial interest as a stockholder gives him standing, and he is entitled to compliance with the laws vindicating that interest, though he may not be able to show specific dollar-and-cents loss from failure to comply with those laws. The Investment Company Act was adopted for the protection of investors. Congress has declared that an investor in an investment company shall have the protection of the act and the protection of the SEC. It is no answer to tell plaintiffs that they may come out better under the liberal Interstate Commerce Act than under the strict Investment Company Act. The law forbids the management to subject the investor to that hazard. *Breswick & Co.* v. *United States,* 134 F. Supp. 132 (S. D. N. Y. 1955).

Another case where economic interest was held to confer standing is *Metropolitan Television Co.* v. *United States,* 221 F. 2d 879 (D. C. Cir. 1955). Petitioner there had protested an FCC order which granted an application by another company to change the frequency and power of its broadcasting station. Petitioner's protest alleged in substance: It is licensee of Radio Station KOA, Denver, Colorado, a Class I-B "clear channel" station. Alvarado Broadcasting Company is licensee of Station KOAT, 330 miles away, in Albuquerque, New Mexico, an adjacent channel station. KOAT's proposed operation will cause interference within KOA's primary and secondary service areas, though outside KOA's normally protected contour. The interference will be substantial, involving an area of 2,000 square

miles with a population of 16,593 within KOA's primary service and an area of 1,238 square miles with a population of 149,202 within KOA's secondary service. The interference "will destroy the usefulness of the KOA signals" in these areas. KOA has actual, as well as potential, listeners in these areas who will be lost as a result of the interference. Surveys show that "a substantial portion of the population" in these areas now listens regularly to KOA. As a commercial radio station it depends for its existence upon advertising revenues. Its attractiveness to advertisers depends on the size of its audience. Its basic selling theme is that it is a "single station network" covering the "Western Market" area, which includes the areas of interference. The fact that it can now claim and substantiate such wide area coverage is one of the reasons it is used by many national advertisers. Though the improved position of KOAT will not, in itself, greatly injure KOA, KOA's loss of listeners will impair its competitive position as to all its competitors in the area, including the Denver Post, and economic injury will result. The Commission thought these allegations too "conjectural and speculative." The court held, however, they make a sufficient showing that petitioner is "likely to be financially injured" by the protested grant, to give petitioner standing under the Communications Act.

As already indicated, the cases are not altogether consistent in their answer to the question of whether the interest of a competitor is sufficient to confer standing. Among the decisions in 1955 holding such interest to be enough are:

Atchison, T. & S. F. R. Co. v. *Summerfield,* 128 F. Supp. 266 (D. C. 1955), where it was held that railroads which carried the bulk of three-cent mail to the west coast had standing to sue to enjoin, and for a declaratory judgment in respect to, the Postmaster General's experimentation with air transportation of three-cent mail.

Pacific Inland Tariff Bureau v. *United States,* 129 F. Supp. 472 (D. Ore. 1955), where motor carriers were held to have standing to enjoin railroads and the ICC from putting into effect an order of the Commission approving a reduction in railroad rates on certain interstate shipments. Where the ICC order might possibly force competing motor carriers out of business or into bankruptcy or inflicted losses upon them which could not have been compensated for, the motor carriers were "persons adversely affected" or aggrieved and were entitled to have the order of the Commission judicially reviewed and to obtain the protection of the court in maintaining the status quo pending reconsideration of the order by Commission.

Denver & Rio Grande Western R. Co. v. *United States,* 131 F. Supp. 372 (D. Colo. 1955), where the court held that, where the ICC, in proceding on a railroad's petition to require defendant railroads to establish joint through rates, erroneously determined that no through routes existed, and thus limited its own power to require joint rates, the complaining railroad suffered a pecuniary injury, giving it standing to

bring an action to have the Commission's order set aside.

On the other hand, the interest of a competitor was held not sufficient in:

Kansas City Power & Light Co. v. *McKay,* 225 F. 2d 924 (D. C. Cir. 1955), where the court held that private electric power companies did not have standing to sue to enjoin federal officers and agencies from carrying out a federally supported power program. The competition which private electric power companies would suffer as a consequence of a federally supported power program was not a sufficient interest to enable the power companies to sue to enjoin execution of the power contracts and the program of the government.

Atchison, T. & S. F. R. Co. v. *United States,* 130 F. Supp. 76 (E. D. Mo. 1955), where a competing railroad was held out to have standing to sue to set aside an ICC order authorizing consolidation of the control of certain motor carriers.

Panhandle Eastern Pipe Line Co. v. *FPC,* 219 F. 2d 731 (3d Cir. 1955), where a pipeline owner was held not aggrieved by an FPC order authorizing construction of a pipeline by another company for the carriage of gas to a certain area in which petitioner was unable to meet the demands of its customers.

First National Bank v. *First Federal Sav. & L. Ass'n,* 225 F. 2d 33 (D. C. Cir. 1955), where the court implied that competing banks did not have standing to secure review of the action of the Federal Home Loan Bank Board granting permission to two federal savings and loan associations to establish branch banks. According to its opinion, no judicially enforceable right of plaintiffs was disregarded by the administrative action brought before the court for review.

Compare *Friend* v. *Lee,* 221 F. 2d 96 (D. C. Cir. 1955), where the operator of an automobile rental service did not have standing to sue the administrator of the CAA and the Director of Washington National Airport to nullify a contract granting an exclusive concession for such service to plaintiff's competitor. Though the contract may be illegal, plaintiff, nevertheless, has no standing to sue to invalidate the contract. Statutes regulating the contracting procedures of officers of the Federal Government are enacted solely for the benefit of the Government and confer no enforceable rights upon persons dealing with it. In consequence, plaintiff cannot contest the award of the contract, either as a bidder or in his capacity as a citizen generally. Plaintiff was, however, held entitled to challenge the action of the administrator in banning deliveries of cars at the Airport by plaintiff.

Board of Public Utility Com'rs v. *United States,* 132 F. Supp. 379 (D. N. J. 1955), where a State regulatory agency and the State itself were held to have standing to maintain an action challenging an ICC order granting a railroad's application to abandon the operation of a ferry within the State.

Parties defendant.—With *Shaughnessy* v. *Pedreiro,* discussed *supra* p. 49, holding that the Commissioner of Immigration was not an indispensable party in an action brought to review a deportation

order, should be compared *Ceballos* v. *Shaughnessy,* 130 F. Supp. 30 (S. D. N. Y. 1955). It involved an action by an alien for a declaration that he was statutorily eligible for suspension of deportation, and for an order directing that his application for suspension of deportation be processed. The district court held that the Attorney General and/or the Commissioner of Immigration were indispensable parties to the action. The court stated that the instant case involved relief against the Attorney General with respect to the discretionary power of suspension of deportation. Effective relief cannot be granted merely by preventing the district director from deporting an admittedly deportable alien. Compelling exercise of the discretionary power to suspend deportation is the *sine qua non* of effective relief in this situation. Without compelling the Attorney General to exercise such discretion, the plaintiff will continue in the status *ad infinitum* of an alien clearly deportable. The district director can never alter plaintiff's status as an admittedly deportable alien; only the Attorney General, notwithstanding such deportability, can suspend his deportation. The court distinguished the *Pedreiro* case (which had then been decided in the court of appeals) on the ground that it did not involve an appeal to higher administrative authority. Pedreiro was not requesting a favor which only the Attorney General could grant; his claim was that he had a right to remain on our shores because he was not deportable in the first instance. One wonders whether the distinction is valid. At any rate, it should be noted that this decision was rendered before the Supreme Court decision in *Pedreiro* and the court could not consequently be expected to know of the extremely liberal attitude toward the question of parties defendant articulated by the highest tribunal in that case.

Compare *B & S Lenox Trade School* v. *Veterans' Education Appeals Board,* 129 F. Supp. 372 (S. D. N. Y. 1955), holding that suit could not be brought against defendant Board *eo nomine.* The court stated that Congress has not authorized the Board to be sued *eo nomine;* neither is it the offspring of such a suable entity. Suit therefore must be against the individual members of the Board, and only where they can be served, which it would appear is the District of Columbia.

Benenati v. *Young,* 220 F. 2d 383 (D. C. Cir. 1955), involving an action against the Commissioner of Immigration and Naturalization and the Chairman of the Civil Service Commission by a security officer at Ellis Island who was discharged from his position for a declaration that he was dismissed in violation of his statutory and constitutional rights. The court held that the other members of the Civil Service Commission were necessary and indispensable parties.

MANDATORY RELIEF.—*Clackamas County* v. *McKay,* 219 F. 2d 479 (D. C. Cir. 1954), may well become a landmark case on the availability of mandatory relief against administrative officers. In it, the court, in a particularly well-reasoned opinion by Prettyman, J., held that where Congress specifically and unequivocally directed the Secretary of the Interior to place moneys

derived from transactions involving lands revested from a railroad into a special account, and to make yearly distribution of specified percentages of the balance in such account to the counties in which the revested lands were situated, but such directions were not followed, mandamus would lie to compel the Secretary to comply with the congressional mandate.

The principal contention of defendant was that this was an action against the sovereign United States, which had not consented to be sued, and that therefore the action would not lie. Judge Prettyman starts his masterful opinion by an apt discussion of the doctrine of sovereign immunity, "Possible philosophical justification for a doctrine of sovereign immunity in our concept of government is a tempting topic for inquiry. Neither of the two bases—Divine Right or the absolute and irrevocable transfer of power by the people—upon which the doctrine of sovereign power was built exists in our theory of government. And the notion that Government officials can be too busy to respond to a citizen's assertion of rights is the precise antithesis of our proud postulate of government by law. And the amiable recitation that when an officer does right he acts officially but when he does wrong he acts individually is a bit of fiction designed to reconcile the maxim that the King can do no wrong with the plain fact that the King, and every other government, frequently does do very wrong,—a fact which we in this country in no wise attempt to deny. We draw much from the British upon this subject, but there is a basic difference between British sovereignty and our sovereignty. In Britain the government—the Crown and Parliament—is the sovereign. In our system the people are the initial and also the residual sovereign; governments are their servants. The sovereign powers of our legislatures and executive officials are delegated by the people and are limited by the scope of the delegations." *Id.* at 488.

Since *Marbury* v. *Madison,* 1 Cranch 137 (U. S. 1803), says Judge Prettyman, the courts have followed its rule, compelling administrative officers to comply with directives of the Congress where a specific directive imposed a ministerial duty devoid of the exercise of judgment or discretion. In such a case for mandatory relief, the doctrine of sovereign immunity is really irrelevant. The assertion that, whenever property or money of the United States is involved in a lawsuit, the United States is a necessary party, was categorically rejected. Court orders compelling performance of merely ministerial acts are not barred by the nonsuability of the United States.

Reviewable action.—*United Distillers Products Corp.* v. *Henneberry,* 135 F. Supp. 37 (D. Mass. 1955), illustrates once again that under our present law it is, not the form, but the effect of an administrative act that determines whether it is reviewable. In the case referred to, the court found that where the Commissioner had informed a distiller by letter that a recent transfer of stock constituted a change in ownership and required the surrender of the old permits and the distiller so surren-

dered them and applied for new permits, the letter was an order suspending the permits. It should, however, be noted that the court held that, under the governing statute, review of such order could be had by petition in the court of appeals, which had exclusive jurisdiction of such review actions. Hence, the district court was found to be without jurisdiction to review.

Compare *Stardust, Inc.* v. *SEC,* 225 F. 2d 255 (9th Cir. 1955), holding that an order for a preliminary investigation to determine the Commission's jurisdiction to investigate the actions of issuers of stock is not an order which is appealable under a statute providing that a person aggrieved by an order of the Commission may obtain review of such order.

Defense in criminal proceeding.—In *United States* v. *Heikkinen,* 221 F. 2d 890 (7th Cir. 1955), defendant alien had been prosecuted for failure to depart from the United States within six months after an order of deportation was entered against him and failure to make timely application for travel or other documents necessary for his departure. The trial court had instructed the jury: "The order of deportation involved in this proceeding was entered after notice to defendant and a hearing had by the defendant pursuant to statute. And you are instructed that said order of deportation is valid and effective for all purposes here, and you will so regard it in all of your deliberations." The court of appeals held that this invalidly deprived the alien of his right to contest the validity of the administrative order which he was charged with violating. Nor did *United States* v. *Spector,* 343 U. S. 169 (1952), justify the trial court's action. The court pointed to defendant's first ground for dismissing the indictment, i.e., "Count One of the indictment fails to show that a lawful Order of Deportation was ever entered against defendant." Mere production of a certified copy of that order hardly meets the challenge leveled against it; nor will reliance upon *Spector* equate to an imprimatur for this deportation order. Quite the contrary, for the case fits into the interstices created by the *Spector* majority. Validity of that order is an inescapable ingredient of the statutory offense with which defendant is charged, indeed it is the precursor of those consequences making behavior criminal under the statutory section on which the indictment is based. Compare *Olvera* v. *United States,* 223 F. 2d 880 (5th Cir. 1955), where the court, in holding that defendant prosecuted for violating a draft board order could set up the defense of invalidity of the order, declared, "there is something alien to our sense of justice and right that the order of an administrative body of laymen, the factual basis of which cannot be inquired into by a court or jury, in effect, by depriving him of a jury trial on the queston of his guilt or innocence, makes a felon of a civilian and deprives him of his liberty." *Id.* at 884. See *Schwartz, Administrative Law and the Sixth Amendment,* 40 A. B. A. J. 107 (1954), for a fuller discussion.

Collateral attack.—The basic principle that once the legislature provides for review the statutory remedy becomes exclusive is applied in *Czaplicki* v. *Vessel "SS*

Hoegh Silvercloud", 223 F. 2d 189 (2d Cir. 1955), where it was contended in an action on a longshoremen's libel that no valid compensation award had been made under the Longshoremen's and Harbor Workers' Compensation Act to libelant. The court held that such award could not be attacked in this action. The Longshoremen's Act provides for direct review of an award and it provides the exclusive method of securing judicial relief.

Scope of review.—There were surprisingly few federal cases during the year on what was until recently the most contested subject in our administrative law, namely, the scope of review. This may indicate that the opposing views have now more or less come together in agreement on section 10(e) of the Administrative Procedure Act as stating the proper essentials of judicial reviewing power.

Under the law today, it is clearly recognized that the question of which conflicting testimony is to be believed is primarily for the agency. As one case expresses it, "The determination of whether her testimony is credible or is to be believed is for the trier of facts. * * * Certainly if this matter were before a jury on testimony and return of the defendant, a court could not direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury." *Larmay* v. *Hobby,* 132 F. Supp. 738, 740 (E. D. Wis. 1955).

Similarly the question of the reasonableness of proposed action is primarily for the administrator. As the Court of Appeals for the District of Columbia stated, in a case involving review of an order of a Board of Zoning Adjustment permitting use of an unimproved lot in a residential district as a parking district, "Though the proposed facility will 'interfere' with the use of neighboring property for residence purposes, the question whether it will interfere 'unreasonably' can only be answered, like any other question of reasonableness, in the light of all the circumstances, and these include the 'critical parking problem on the south side of Capitol Hill.' There is, we think, ample room for difference of opinion on this question. The Board of Zoning Adjustment is created and qualified to decide such question of opinion. Courts should not substitute their opinion for the Board's." *Selden* v. *Capitol Hill Southeast Citizens Ass'n,* 219 F. 2d 33, 35 (D. C. Cir. 1954, on rehearing 1955).

On the other hand, according to *Williams* v. *United States,* 127 F. Supp. 617, 619 (Ct. Cl. 1955), the fact that there is evidence considered of and by itself, to support the administrative decision is not sufficient where there is opposing evidence so substantial in character as to detract from its weight and render it less than substantial on the record as a whole. This is clearly the way in which the substantial evidence rule must be applied under the celebrated decision of the Supreme Court in *Universal Camera Corp.* v. *NLRB,* 340 U. S. 474 (1951).

Jurisdictional fact.—The jurisdictional fact doctrine enunciated in *Crowell* v. *Benson,* 285 U. S. 22 (1932), was at issue in *Riley* v. *Henderson,* 218 F. 2d 752 (5th Cir. 1955). It involved review of an order

denying an award under the Longshoremen and Harbor Workers' Compensation Act on the ground that the death did not arise out of and in the course of employment. The court agreed with the district court that the testimony constituted substantial evidence that the death did not arise out of and in the course of employment, and that a determination whether there was substantial evidence was the proper scope of judicial review. Appellants asserted that they were entitled to a trial *de novo* of the question whether the death arose out of and in the course of employment, under *Crowell* v. *Benson.* But the Court declared, "We are convinced that this question does not go to the power of the deputy commissioner to adjudicate concerning the subject matter, but goes rather to the merits of the controversy; that it is not jurisdictional, but substantive. Hence, the *Crowell* case does not apply here. The trial court properly denied a trial *de novo.* It is unnecessary to consider appellees' contention that the rule of that case is of doubtful validity in the light of more recent Supreme Court cases." *Id.* at 754.

Gray v. Powell doctrine.—The doctrine of *Gray* v. *Powell,* 314 U. S. 402 (1941), under which agency applications of statutory terms to facts are treated like findings of fact for purposes of the scope of review, is today the most controversial aspect of the scope of review. See *Schwartz, Gray* vs. *Powell and the Scope of Review,* 54 Mich. L. Rev. 1 (1955), for a complete discussion of the doctrine. A 1955 case illustrating the application of the doctrine is *Irvin* v. *Hobby,* 131 F. Supp. 851 (N. D. Iowa 1955). At issue in it was an agency finding of the non-existence of an employer-employee relationship. Under *Gray* v. *Powell,* such a finding is to be treated as one of fact, whose review is governed by the substantial evidence rule. And this is the approach of the instant court. "The finding purported to be a finding of fact based upon the surrounding facts and circumstances and the conclusions and inferences drawn therefrom. It is the view of the Court that the finding of the Referee as to the non-existence of an employer-employee relationship is a finding of fact. That finding, if supported by substantial evidence, is conclusive upon this Court. In passing upon the question as to whether that finding is supported by substantial evidence, it is the duty of this Court to consider the whole record. * * * The finality given to a finding of fact by the Social Security Agency extends to the inferences and conclusions drawn from the evidence if there is a substantial basis for them. * * * It is the view of the Court that there is a substantial basis for the inferences and conclusions drawn by the Referee in this case." *Id.* at 863.

This approach is valid even though the finding at issue may be more legal than factual in nature, and though it clearly involves statutory interpretation. Even in such a case, deference must be paid to agency *expertise.* This was the view of the court in *Director, Bureau of Mines* v. *Princess Elkhorn Coal Co.,* 226 F. 2d 570 (6th Cir. 1955), where Judge Martin stated, "The matter presented for decision here falls clearly within the doctrine of expert-

ness promulgated in opinions of the Supreme Court. The members of the Federal Coal Mine Safety Board of Review are much better qualified than are the members of this court to interpret the meaning of the word 'face' as used in the Act, in the context of the facts found by the Board. We think the conclusions of the majority of the Board are reached upon sound reasoning and rest upon a 'rational basis' and upon 'warrant in the record'." *Id.* at 574.

But compare *Contract Steel Carriers* v. *United States,* 128 F. Supp. 25 (N. D. Ind. 1955), where the court held the definition of "contract carrier" within the Interstate Commerce Act embodied the common law concept of the term, and the ICC's requirement that a carrier, to attain this status, must restrict itself to specialized contracts, a requirement not present at common law, was unlawful. The court stated, "We are not unmindful of the rule that a regulatory agency is not bound by common law standards of definition in cases where the task of defining a statutory term is delegated to it, * * *or of the rule that such an administrative interpretation is not a question of law for judicial determination. * * * However, in the statute before us, Congress has defined the term 'contract carriers.' Thus the question before us is not merely one of the application of the statute to a particular case, but whether the postulate applied by the Commission represents an unlawful departure from that express statutory definition. That question we answer in the affirmative." *Id.* at 32.

Subpoenas. — According to *NLRB* v. *Gemalo,* 130 F. Supp. 500 (S. D. N. Y. 1955), a proceeding on the motion of the Board for an order requiring respondent to comply with a subpoena was not required to bet set aside because the Board then lacked a General Counsel, since he had resigned and a successor had not yet been appointed when this proceeding was brought. The court rejected the contention that the attorney acting for the General Counsel in requesting the subpoena and in seeking its enforcement was in effect a "headless horseman". In the court's view, once the complaint has been filed, the rest of the prosecution thereof stems from that filing and that prosecution is expected to be performed by lower echelons of the General Counsel's staff. See, similarly, *NLRB* v. *Kingston Trap Rock Co.,* 222 F. 2d 299 (3d Cir. 1955).

Agency violation of own regulations.— The basic rule that an agency is bound by its own regulations, which have the force of law while they are in effect, is applied in *McKay* v. *Wahlenmaier,* 226 F. 2d 35 (D. C. Cir. 1955). It was argued there that, since defendant Secretary devised the regulation, he alone had the right to say what the consequences of violating it should be. The court held, on the contrary, that the Secretary was bound by his own regulation so long as it remained in effect. "He is also bound, we think, to treat alike all violators of his regulation. He may not justify, simply by saying the violation is unimportant, his departure in a single case from an otherwise consistent policy of rejecting applications which do not conform to the regulation." *Id.* at 43.

ESTOPPEL.—*Medalia* v. *Folsom,* 135 F. Supp. 19 (D. Mass. 1955), was a proceeding to review a decision of a referee of the Social Security Administration holding that plaintiff was entitled to old age insurance benefits from May 1953, but not before that date. The court held that where plaintiff, a disabled army colonel, made a telephone call to a Social Security Office inquiring concerning a recent bill making army people eligible for social security, and was told the office knew nothing about it, though in fact the law had recently been changed to make such people eligible for benefits, the agency was not estopped from denying that the person was eligible for benefits as of the date of such inquiry. The court asserted categorically that estoppel may not be asserted against an agency of the United States.

Compare *United States* v. *Certain Parcels of Land,* 131 F. Supp. 65 (S. D. Cal. 1955), where the Government was held estopped by the conduct of its agents in a condemnation case. The court there declared that, in cases where sovereign immunity to suit has been waived, the Government can be estopped by the conduct of its agents in the same circumstances as a private individual, partnership, or corporation. "The law requires, it is true, that: 'Men must turn square corners when they deal with the Government.'* * * '[But] there is no reason why the square corners should constitute a one-way street'." *Id.* at 75.

PENDENCY OF CRIMINAL PROCEEDINGS.—In an interesting case, the Court of Appeals for the District of Columbia held that the revocation of a taxicab operator's license on the ground that he had sexually assaulted and robbed a citizen at gun point, was a violation of due process where a hearing on the charges had been held while criminal charges based on the same alleged offense were pending. *Silver* v. *McCamey,* 221 F. 2d 873 (D. C. Cir. 1955). The court declared that due process is not observed if an accused person is subjected, without his consent, to an administrative hearing on a serious criminal charge that is pending against him. His necessary defense in the administrative hearing may disclose his evidence long in advance of his criminal trial and prejudice his defense in that trial.

The court rejected the contention of the licensing board that its holding meant that the public must be left without protection against an accused hacker pending his criminal trial. Nothing prevents the board, while a criminal charge is pending, from holding a hearing and taking action on the question whether, because it is pending, a license should be temporarily suspended. Such temporary suspension is in some respects like a denial of bail. Though each is exceptional, each is sometimes necessary to the protection of the public. Immediate revocation of a license is not. Since neither denial of bail nor suspension of a license involves a finding of guilt or a permanent loss of employment, the hearing involved in either need not require disclosure of defenses to the criminal charge. Accordingly temporary suspension of a license, unlike revocation, pending a serious criminal charge, need not be inconsistent with due process. The court did, how-

ever, reject the view that the board cannot retry a criminal charge on which the plaintiff has been tried and acquitted in court. That acquittal on a criminal charge is not a bar to a civil action by the Government, remedial in its nature, arising out of the same facts on which the criminal proceeding was based has long been settled. For at least two reasons, said the court, *res judicata* does not apply. (1) Acquittal may mean only that material facts are not proved beyond a reasonable doubt. It may still be possible to prove them sufficiently for civil and administrative purposes. (2) Asserted facts that cannot be proved by any standard, and are material in the criminal prosecution, may be immaterial in the administrative proceeding. Misconduct need not amount to rape in order to show that a man is unfit to operate a taxicab.

Delegation.—*Carey* v. *United States,* 132 F. Supp. 218 (Ct. Cl. 1955), involves the interesting question of whether the President must personally exercise a power vested in him by law. The plaintiff was a United States Attorney who had been suspended from office by the Attorney General. The plaintiff asserted that only the President himself could exercise such power. The record, however, showed that the Attorney General advised the President before acting and was given authority by the President to take such steps as might be necessary in the premises, and that the President afterward was advised of the action taken and it was in effect approved by him. Under these facts, the court held that the suspension was valid. "In the circumstances we think that the action taken after consultation with the President, apparently with his approval, was sufficient exercise of the President's power and from a practical viewpoint the natural way in which the President would take a step of this kind. To hold otherwise would be like determining that a decree of a court was not action by the court because, forsooth, the order was prepared by the clerk and typed by the secretary." *Id.* at 221. After examining the many duties devolved upon the President under our Constitution and laws, the court asserts that it is physically impossible for the Cheif Executive personally, physically, and individually to exercise all these powers. "There is a limit to human capacity. To expect the President to attend to all these obligations personally is out of the question. In the vast and complicated governmental setup in this broad, big country there must be a practical way of discharging these duties." *Id.* at 222. Compare the famous first *Morgan* case, 298 U. S. 468 (1936), where the Court held that the duty of decision imposed upon a Cabinet Secretary was a personal one which could not be delegated.

STATE CASES

Right to be heard.—In a noted 1952 decision, the New York Court of Appeals had held that a license to operate an automobile could not be taken away unless the individual affected was given a full opportunity to be heard. "A license to operate in automobile," said the court there,

"is of tremendous value to the individual and may not be taken away except by due process." *Wignall* v. *Fletcher,* 103 N. E. 2d 728, 730 (N. Y. 1952). In *Hecht* v. *Monaghan,* 121 N. E. 2d 421 (N. Y. 1954), that decision was applied to a case involving the revocation of a taxicab driver's license. According to Judge Conway, what the court had said in the earlier case (involving only an operator's license) is equally applicable here. "Indeed, it may be stated with even greater force here, for * * * the license involved in the present case is of far greater value to the hack driver than an operator's license is to the ordinary person. The hack driver's license is the hack driver's permission to lawfully carry on his business or occupation * * *. [I]n view of the fact that petitioner's license is a condition precedent to his continuance in that occupation, this license is comparable to the 'right' to continue in business." *Id.* at 423-24. The fact that the enabling statute does not expressly require a hearing, continues Judge Conway, does not change the result here. Where property rights are adversely affected by administrative action the courts have *implied* the requirement of notice and hearing, although the statute was silent.

Judge Conway draws an interesting distinction between the position of the taxi driver and that of a government employee, who can be discharged from his employment without notice or hearing (unless, of course, notice and hearing are required by statute). The petitioner here was not a public employee, but a private citizen. His livelihood depended upon the persons whom he served as a licensed taxi driver. He was not required to report his every action to a government superior, but was merely subject to limited regulation with regard to certain aspects of his business. Since his income did not come from the public coffer, he—and others in similar positions —should not be controlled by the same rules applicable to the suspension and discharge of public employees.

An important aspect of Judge Conway's opinion is his clear classification of the nature of the licensing function. He starts by stating the categories into which administrative functions fall: "When dealing with the public, the functions of an administrative agency fall into two broad categories, legislative and judicial." *Id* at 424. From the procedural point of view it is of cardinal significance to determine whether an agency exercising particular licensing powers is acting in a legislative or in a judicial capacity. For it is only in the latter case that the procedural safe guards that have developed in connection with the exercise of judicial functions need be adhered to, unless express requirements are imposed by the relevant enabling statute. In the instant case, Judge Conway asserts strongly that license revocation is a judicial, rather than a legislative, function; and it is upon this that his holding of the existence of a right to be heard really depends. "Where, as in the present case, the statute empowers the agency to revoke a license because of a failure to comply with or because of willful or knowing violation of the regulations of that agency, then the administrative act is of a judicial

nature since it depends upon the ascertainment of the existence of certain past or present facts upon which a decision is to be made and rights and liabilities determined. It is clearly not a merely administrative act concerned with the internal functioning of the agency itself, but is a judicial or quasi-judicial function of the administrative body." *Ibid.*

According to the highest court of Michigan, the right to be heard before agency action is not eliminated by the right to be heard on judicial review, even where the statute provides for a full trial *de novo* on review. This statutory provision, said the court, did not obviate the necessity of a proper, legal hearing before the commission. It did not contemplate that the failure of the commission to hold a proper hearing should be corrected by appeal. The legislature gave to the court the right and duty to pass judgment upon the decision and order of the commission based on the record of such proceedings before said commission. *L. A. Darling Co.* v. *Water Resources Commission,* 67 N. W. 2d 890, 896 (Mich. 1955). This holding is, it should be noted, contrary to the federal rule, under which the right to be heard is satisfied by a hearing on judicial review in a trial *de novo,* even though a full hearing has not been held at the agency level. See *Jordan* v. *American Eagle Fire Ins. Co.,* 169 F. 2d 281 (D. C. Cir. 1948).

Delegation of hearing power.—Two New Jersey decisions involved hearings not presided over by all of the members of the agency. In *Asbury Park* v. *Department of Civil Service,* 111 A. 2d 625 (N. J. 1955), a civil service disciplinary proceeding, part of the testimony was heard by one member and part by two other members. The court held this invalid, stating that there is no authority which sanctions the hearing of part of a disciplinary appeal before some members and part before other members of the commission. The general rule governing the hearing and decision of disciplinary matters by boards or commissions, founded upon considerations of the fundamentals of fair play, is that fairness and impartiality can only be assured when the members participating in the deliberations and decision of the board or commission, following a hearing on employee performance, have had an equal opportunity to hear and evaluate all of the evidence presented at the hearing. This is particularly true in a case like this where the agency decision turned entirely on the credibility of the witnesses. "No one would doubt the invalidity of a jury verdict if half the jury heard only the plaintiff's witnesses and the other half heard only the testimony on behalf of the defendant. Fair play is plainly denied to litigants when a trier of fact who has not heard and evaluated all the testimony influences the decision by his participation in the deliberations by which it is reached. The members of the commission designated to hear and decide appeals of the instant class constitute the collective finder of fact and any one of those designated who has not heard all the testimony in a given case 'occupies no legal status as arbiter or judge to adjudicate upon the cause.' * * * Since none of the three commissioners who

participated in this case heard all of the testimony, it follows that the commission's decision is a nullity." *Id.* at 627. Compare *Passaic* v. *County Board of Taxation,* 113 A. 2d 753 (N. J. 1955), where two members of the agency were designated to hear the testimony but, while one of those designated members sat throughout the entire hearing, other members were at times during the hearing substituted for the other designated member. The court held this invalid, saying that the members assigned to conduct a proceeding and who report to the full Division must hear the proceedings throughout.

Conduct of hearing.—In the New York *Hecht* case already discussed, *supra* p. 84, the court gives a useful summary of the law governing the conduct of an agency hearing. As it aptly states: "The hearing held by an administrative tribunal acting in a judicial or quasi-judicial capacity may be more or less informal. Technical legal rules of evidence and procedure may be disregarded. Nevertheless, no essential element of a fair trial can be dispensed with unless waived. That means, among other things, that the party whose rights are being determined must be fully apprised of the claims of the opposing party and of the evidence to be considered, and must be given the opportunity to cross-examine witnesses, to inspect documents and to offer evidence in explanation or rebuttal." 121 N. E. 2d at 425.

Of significance is the New York court's rejection of the claim that, even though the individual can show a violation of a procedural rule by an agency, he cannot prevail unless he can demonstrate that the agency should have held for him on the merits. The whole point of the law of procedural due process is, however, that the merits of the case are irrelevant when once it is shown that the procedure has not been fair. "To one who protests against the taking of his property without due process of law, it is no answer to say that in this particular case due process of law would have led to the same result because he had no adequate defense upon the merits." *Ibid.*

The actual hearing in the *Hecht* case appears hardly to have been conducted in a manner appropriate to a proceeding which was of such great consequence to the taxi driver concerned. Petitioner had been charged with short-changing someone who had engaged his cab, the latter being the complaining witness against him at the hearing. The record, as summarized by the court, seems to reek with unfairness and it is simply shocking that, in the nation's largest city, a man can be deprived administratively of his livelihood in a proceeding like that described in the court's opinion. Apart from the general aura of unfairness one obtains from Judge Conway's description of the hearing, three specific errors are noted. Though a hack bureau memorandum was introduced, in which the charge against the petitioner was spelled out, there was, during the hearing, no actual *testimony* by the complaining or other witness that petitioner had withheld change as charged. Even considering the memorandum as a substitute for testimony as to its facts, at the

very least the petitioner should have been so informed and should have had the right to cross-examine the witnesses with regard to such proof. In addition, though the charge against the petitioner was based, as has been indicated, upon a specific charge of misconduct (that of short-changing a customer), at the end of the hearing, the petitioner was informed by the hearing officer that his license was revoked on the basis of "your *record* here and your actions in this case today." As the court points out, what this "record" was did not appear anywhere in the minutes of the hearing, or in the summons. There was no way for the petitioner to have known that his past history was to be considered in passing upon his purported offense here. "Inasmuch as it was a substantial basis upon which the license was revoked, petitioner had a constitutionally guaranteed right to know in advance of the hearing that that evidence would be considered. That he did not have, and that is sufficient reason to set aside the determination of the administrative body." *Id.* at 427.

Even more important perhaps in showing the way in which the agency concerned conducted this proceeding—which had such drastic implications upon the individual's right to pursue his chosen livelihood—was the fact that, at the hearing, none of the witnesses was sworn. This means, to quote the apt language of the New York court, "that at this hearing the traditional safeguards to truthfulness developed in our common-law procedure were absent, viz., (1) cross-examination through which an opponent is enabled to expose intentionally false swearing and also to bring to light circumstances bearing upon inaccuracies of the witnesses in observation, recollection and narration, and to lay the foundation for impeachment of the witnesses, and (2) the judicial oath administered to witnesses with the attendant penalties for willful and deliberate perjury." *Id.* at 428.

First Morgan rule.—Though the rule of the fourth *Morgan* case, discussed *supra,* p. 40, makes it most difficult for one seeking review successfully to allege that agency decision processes have been improper, it does not necessarily eliminate all judicial control of such processes. For cases can arise, even if most rarely, where all the circumstances clearly show an improper decision process, even though the testimony of agency deciding officials may not, under *Morgan IV,* be directly available. A case of this kind was presented for decision to the highest court of New York in *Kilgus* v. *Board of Estimate of City of New York,* 127 N. E. 2d 705 (N. Y. 1955). It arose out of a proceeding to review a determination of respondent board denying petitioner's application, as the widow of a deceased member of the New York City Employee's Retirement System, for accidental death benefits. A hearing had been held before an employee of the board, and the board had adopted his recommendation that the application be denied. The record indicated that a majority of the board adopted the recommendation of the hearing officer because they felt bound by his findings, making no independ-

ent determination of the matter themselves, in the belief and expectation that the courts would make a full review of the case and remedy any error on their part. According to the court, this violated the board's duty to make its own personal appraisal of the evidence and to reach its own independent conclusion in the matter. There is a clear responsibility imposed upon the board to decide upon its own independent judgment when it is vested with the deciding power by the legislature. Though the board may appoint a hearing officer to assist it in its consideration of the problems presented by the application, it may not adopt the report of such officer without independent consideration of the sufficiency and quality of the evidence adduced before him. The New York court is, in effect, here merely applying the famous rule of the first *Morgan* case, 298 U. S. 468 (1936), that the one who is by law vested with the duty of deciding must be the one who actually decides the case on his own independent judgment. For a complete discussion of the *Morgan* cases, see *Schwartz, Institutional Administrative Decisions and the Morgan Cases: A Re-examination,* 4 J. of Pub. L. 49 (1955).

It is true, as we have seen, *supra,* p. 40, that the fourth *Morgan* case holds that a court cannot go behind an administrative decision to probe the mental processes of the deciding officers in order to determine whether the rule of the first *Morgan* case has been violated. What the majority of the New York court did here does not, however, seem to violate the principle. On the record as it was presented to the court, there had been a patent failure on the part of the agency concerned to exercise the personal deciding responsibility which the law imposed on it. Nor was it necessary to probe the mental processes of the board to determine what actual consideration they had given to the case; their own statements at their meeting in which they denied petitioner relief made it obvious that all they had done was to rubber-stamp the findings of the hearing officer without any real personal consideration on their part. As the opinion of the New York court states, "we do not 'probe' the mental processes when we hold that statements made by members of the board having a majority of the votes, clearly reveal that they made no independent conclusion * * *. We merely repeat their own statements of their own mental processes in reaching their conclusions." 127 N. E. 2d at 710.

Notice.—In *Securities Commission* v. *Holovachka,* 124 N. E. 2d 380 (Ind. 1955), a cease and desist order restraining appellee from further selling certain securities was set aside because of violation by the agency of the elementary rule that the individual concerned must, in advance of the hearing, be given notice sufficient to inform him of the charges against him. The requirement of charges and a hearing tie in together. The right to a hearing includes the right to know and meet the charges. The agency in this case had not filed or presented any charges against appellee. His own statements, made at a preliminary hearing, did not constitute charges against

him. There could be no hearing without charges.

JUDICIAL REVIEW: AVAILABILITY.—In *Guardian Life Ins. Co.* v. *Bohlinger,* 124 N. E. 2d 110 (N. Y. 1954), the highest court of New York was called upon to decide whether certain action taken by the Superintendent of Insurance was subject to judicial review in a proceeding under article 78 of the Civil Practice Act. The action referred to was a determination of the Superintendent denying an application made to him by an insurance company for approval to purchase certain real property. There was no provision in the Insurance Law expressly subjecting the administrative action at issue to review; nor was there any express preclusion of review in the statute. Nonetheless, the court, in an opinion by Fuld, J., held that review was barred as effectively as though there had been an express statutory provision for preclusion.

Judge Fuld's opinion starts by declaring that though the courts are hesitant to rule that the discretion of an administrative officer or board is not subject to judicial review, "it is settled that the legislature may, if it sees fit, provide that certain action 'is not a matter open to [such] review.' In our view, the legislature has so provided here." *Id.* at 112. The legislative intent to preclude review, according to the court, is to be found in the fact that it has expressly provided in the Insurance Law for review of certain orders and acts of the Superintendent. "Carefully and deliberately, it has selected those actions of the Superintendent which are to be subject to judicial review, and those which are not unequivocally indicating which action is appealable and which is not." *Ibid.*

The failure of the legislature to provide explicitly for review of an order like that at issue in the instant case indicates its intent that no review was to be available. "We deem it clear * * * that, in expressly providing for review in some sections of the Insurance Law and making no provision for such review in other sections, the legislature followed a consistent and purposeful pattern." *Id.* at 113.

It was the legislative design that the Superintendent's acts be reviewable only where the statute expressly so provided.

The court's importation of the doctrine of "implied preclusion" of review into the administrative law of New York appears unwarranted. The failure of the legislature to provide expressly for review of particular administrative action does not, as the Court of Appeals seems to say, indicate an intent to preclude review. It means only that a nonstatutory action for review must be brought in the appropriate court of general jurisdiction, which in New York is a proceeding under article 78 of the Civil Practice Act in the Supreme Court. The leading case of *Stark* v. *Wickard,* 321 U. S. 288 (1944), is directly pertinent here. In it, as in the New York case being discussed, the relevant statute provided expressly for review of certain acts of the agency involved, but made no provision for review of the specific acts at issue. This did not, however, lead the Supreme Court to hold that review was barred. On the contrary, the mere legislative failure to

provide for review did not mean that all review was precluded, even though the legislature had expressly provided for review in some other cases.

One wonders, indeed, whether the New York court itself realizes the full implications of its holding that there is to be no review. As a federal court has aptly stated, "If the judiciary has no power in such matter, the only practical restraint would be the self-restraint of the executive branch. Such a result is foreign to our concept of the division of powers of government." *Fleming* v. *Moberly Milk Products Co.,* 160 F. 259, 265 (D. C. Cir. 1947).

Napoleon Bonaparte, himself certainly no enemy of effective administration, once expressed the same principle in a more striking manner: "I do not see how there could be property owners in France if a man could be irrevocably deprived of his field by a mere administrative decision." See *Schwartz, French Administrative Law and the Common-Law World,* 154 (1954).

Scope of review.—We saw *supra* p. 80 how the federal courts have restricted the scope of review of agency applications of statutory terms to facts under the doctrine of *Gray* v. *Powell,* 314 U. S. 402 (1941). Many States have, however, refused to follow the *Gray* v. *Powell* doctrine. Illustrative of their view is a Mississippi decision, *Mozingo* v. *Mississippi Employment Security Com'n,* 80 S. 2d 75 (Miss. 1955), where the court rejected an agency finding that certain salesmen were "employees." Said the court in language clearly inconsistent with the federal rule, "We are not confronted here with the rule that the decision of the Commission should prevail if supported by substantial evidence. There is no material dispute in the evidence as to the actual operations of the parties. The Commission's decision was not a ruling on the facts but rather a construction of the facts whereby it erroneously determined the relationship of the parties." *Id.* at 80.

Jurisdictional fact.—In an interesting opinion by Justice Edmonds, the California court dealt with a claim that a jurisdictional fact was at issue on which there could be full review. The court states that it is questionable whether California has adopted the rule of *Crowell* v. *Benson,* 285 U. S. 22 (1932), the famous case enunciating the jurisdictional fact doctrine. Under California law, it should be noted, there is no real reason for distinguishing between jurisdictional facts and other factual determinations by an agency, since, under the California scope of review, an aggrieved party is entitled to a trial *de novo* on all issues on review of the determinations of a state-wide administrative agency. Nor could the jurisdictional fact doctrine be used here to avoid the rule requiring the exhaustion of administrative remedies. *Temescal Water Co.* v. *Department of Public Works,* 280 P. 2d 1 (Cal. 1955).

Executive removal power.—An important New Jersey decision deals with the power of the Governor to suspend an Assistant Chief Examiner in the State Department of Civil Service pending the hearing and determination of charges brought

against him as grounds for removal. The court held that under a provision of the State Constitution authorizing the Governor to remove state officers and employees from their positions, the Governor had power to suspend the Assistant Chief Examiner from his position pending a hearing on charges filed against him of malfeasance and misfeasance in office. The constitutional provision granting express power to the Governor to remove public officers after hearing and for just cause, was intended to confer upon him the additional power of temporary suspension incidental to removal, which had already been engrafted upon the removal power and made an integral part of it by judicial interpretation. The court states it is not naive enough to be unaware of the possible abuses to which the power of suspension, which the appellant termed a "weapon of frightful magnitude", may be subject in the hands of an arbitrary chief executive. But it is also fully conscious of the potential jeopardy to the public interest by the continuance in office of an employee who may have already betrayed his trust and against whom charges of misconduct are pending as a result of a bona fide investigation. It needs little reflection to adumbrate the serious impairment which might befall the public good if the chief executive is powerless to protect the State against further defalcations. *Russo* v. *Walsh*, 113 A. 2d 516 (N. J. 1955).